IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

Nos. 76-777, 76-933, 76-934, and 76-935

PEGGY J. CONNOR, ET AL., *Appellants*

v.

CLIFF FINCH, GOVERNOR OF MISSISSIPPI, ET AL.

On Appeals from the United States District Court for the Southern District of Mississippi

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BRIEF FOR PRIVATE APPELLANTS, PEGGY J. CONNOR, ET AL.

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OPINIONS BELOW

The District Court's opinions of August 24, 1976 and September 8, 1976 are reported at 419 F. Supp. 1072 and 1089, and are reproduced in the Appendix, Vol. III, pp. 94-138. The District Court's subsequent Opinion of November 12, 1976 (App., Vol. III, pp. 220-31), final judgment of November 18, 1976 (App., Vol. III, pp. 232-48), and order amending previous judgment of December 21, 1976 (App., Vol. III, pp. 279-82) are unreported.

JURISDICTION

The final judgment of the three-judge District Court was entered on November 18, 1976. On the same day private plaintiffs, Peggy J. Connor, et al., filed their

notice of appeal (App., Vol. III, p. 249) from paragraphs 7 and 8 of the final judgment in which the District Court ordered special interim legislative elections in only two new House districts and deferred setting a date for those elections until the time for taking any appeals had run or until any appeals had been decided on the merits (*Connor* v. *Finch,* No. 76-777).[1] The private plaintiffs also filed a timely motion to alter or amend judgment contesting certain districts established in the District Court's plan on November 29, 1976 (App., Vol. III, pp. 250-58), and the District Court entered an order amending previous judgment on December 21, 1976 (App., Vol. III, pp. 279-82). The private plaintiffs filed their notice of appeal from the entire judgment, as amended, on December 27, 1976 (App., Vol. III, p. 283). The United States as plaintiff-intervenor filed its notice of appeal on December 28, 1976 (App., Vol. III, p. 284). The defendants filed their notice of appeal (J.S., *Finch* v. *Connor,* No. 76-933, App. F, p. 81a) on December 30, 1976.

On December 8, 1976, this Court noted probable jurisdiction in No. 76-777 (App., Vol. III, p. 259). On January 17, 1976, the Court noted probable jurisdiction in Nos. 76-933, 76-934, and 76-935, and consolidated the three subsequent appeals with No. 76-777 for briefing and oral argument on February 28, 1976 (App.,

[1] On December 8, 1976, this Court denied plaintiffs' application for interim injunctive relief pending appeal (No. A-421) but noted probable jurisdiction in No. 76-777 and expedited the appeal by requiring that briefs on the merits be filed by February 7, 1977, and responsive briefs by February 21, 1977, and by setting oral argument for February 28, 1977. The Court further ordered that notices of appeal and jurisdictional statements in any other appeals be filed by January 5, 1977.

Vol. III, p. 285). The jurisdiction of this Court is conferred by 28 U.S.C. § 1253 as a direct appeal from the final judgment of a three-judge District Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment provides in part:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * *
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The Fifteenth Amendment provides:

> SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SECTION 2. The Congress shall have power to enforce this article by appropriate legislation.

Title IV, § 402, of the 1975 amendments to the Voting Rights Act of 1965, 89 Stat. 404, 42 U.S.C. § 1973*l*(e), provides:

> "(e) In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988, provides:

> "In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding by or on behalf of the United States of America to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

QUESTIONS PRESENTED

1. Whether the District Court erred in refusing to order special interim legislative elections in more than two new House districts prior to the regular 1979 quadrennial state legislative elections to remedy the malapportionment and dilution of black voting strength present in court-ordered legislative reapportionment plans ordered for the 1967, 1971, and 1975 state legislative elections.

2. Whether the District Court erred in ordering into effect a court-devised Mississippi Senate reapportionment plan based not on 1970 Census data, but on the election returns for the 1975 Democratic gubernatorial primary, which provided a total deviation of 16.5%, and which in certain districts diluted black voting strength, rather than ordering plaintiffs' proposed alternative Senate plan based on 1970 Census data which provided a total deviation of only 13.7%, which adhered more closely to political subdivision boundaries than the court's own plan, and which avoided the dilution of black voting strength in the court's plan.

3. Whether the District Court erred in rejecting—without a hearing or stating reasons therefor—plaintiffs' and plaintiff-intervenor's objections that certain districts in the court-devised House plan were malapportioned and/or diluted black voting strength, and in rejecting proposed alternatives which cured the malapportionment and dilution in the court's districts without disrupting the structure of the court's House plan.

4. Whether in the face of the 1975 attorneys' fee amendment to the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(e), and the Civil Rights Attorneys' Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 (October 19, 1976), the District Court erred in denying plaintiffs' motion for an award of attorneys' fees on a finding that the Mississippi Legislature had made a good faith effort to reapportion itself.

STATEMENT

When this case was last before the Court last Term on plaintiffs' petition for a writ of mandamus, this Court directed the District Court to

> " 'bring this case to trial forthwith' * * * to the end of entering a final judgment embodying a permanent plan reapportioning the Mississippi Legislature in accordance with law to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter." *Connor* v. *Coleman,* 425 U.S. 675, 679 (1976).

In response, the District Court ordered for the 1979 legislative elections new reapportionment plans for

the Mississippi Senate and House of Representatives based on political subdivision boundaries and providing for both houses single-member districts statewide. 419 F. Supp. 1072, 1089, final judgment entered November 18, 1976 (App., Vol. III, pp. 232-48), revised in Order Amending Previous Judgment of December 21, 1976 (App., Vol. III, pp. 279-82). In entering its permanent plan, the District Court rejected without explanation and without a hearing plaintiffs' proposed alternative Senate plan (Modified Henderson Senate County Boundary Plan, App., Vol. III, pp. 186-96) which also was based exclusively on county, supervisors' district, and voting precinct boundaries and established single-member districts statewide, but which provided greater equality of population among the districts, less dilution of black voting strength, and less fracturing of county lines. The District Court also rejected alternative plans for certain House districts proposed by plaintiffs (App., Vol. III, pp. 191-96) and plaintiff-intervenor which would have provided for less fragmentation of black voting strength in certain districts.

For special elections, the District Court in its final judgment ordered only two special elections prior to the regular 1979 legislative elections in two majority black House districts and refrained from setting dates for those two special legislative elections "until time for an appeal has expired or until the Supreme Court shall have decided an appeal on the merits" (App., Vol. III, p. 247).

The District Court also denied plaintiffs' motion for an award of attorneys' fees, stating that "the Mississippi Legislature made a good faith effort to reapportion itself in 1973 and 1975. The 1975 effort was upheld

by this Court but failed on account of the disapproval of the Attorney General of the United States" (Opinion of November 12, 1976, App., Vol. III, p. 230).

A. Prior Proceedings.

For more than eleven years, plaintiffs have been seeking nondiscriminatory and equally apportioned state legislative districts for the election of members of the 122-member Mississippi House of Representatives and 52-member Mississippi Senate. Plaintiffs, who are eight black Mississippi registered voters and an unincorporated association, the Mississippi Freedom Democratic Party, filed this action (App., Vol. I, pp. 37-46) on October 19, 1965, as a class action challenging the state legislative and congressional districts [2] and seeking constitutional and equitable reapportionment pursuant to the Fourteenth and Fifteenth Amendments and 42 U.S.C. §§ 1983 and 1988. District Court jurisdiction was conferred by 28 U.S.C. §§ 1343, 2201 and 2202, and a three-judge District Court was convened pursuant to 28 U.S.C. § 2281.

The defendants are the Governor, the State Attorney General, and the Secretary of State—who constitute *ex officio* the Mississippi Board of Election Commissioners [3]—the Lieutenant Governor—who is *ex officio* the Presiding Officer of the Mississippi Senate—the President Pro Tempore of the Mississippi Senate, and the Speaker and Speaker Pro Tempore of the Mississippi House of Representatives.

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[2] The District Court's unreported opinion and judgment sustaining the Mississippi Legislature's 1966 statute redistricting the state's five congressional districts was summarily affirmed by this Court, *Connor* v. *Johnson*, 386 U.S. 483 (1967). Thereafter, congressional redistricting was no longer an issue in this case.

[3] Miss. Code Ann. § 23-5-1 (1972).

On July 22, 1966 the District Court held unconstitutionally malapportioned the reapportionment plan enacted by the Mississippi Legislature in 1962 and adopted by the voters as a constitutional amendment in 1963.[4] *Connor* v. *Johnson,* 256 F. Supp. 962 (S.D. Miss. 1966).[5] The Mississippi Legislature enacted a new reapportionment plan in a special session in 1966,[6] and the District Court on March 3, 1967 invalidated that plan for unconstitutional malapportionment and promulgated its own plan for the 1967 legislative elections. *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss. 1967). Under the District Court's 1967 plan, a majority of the membership of the Mississippi Legislature was elected from multi-member and floterial districts,[7] and the court-ordered plan was malapportioned by total deviations of 20.84% in the House (excluding floterial

[4] Miss. Laws, 1962, 2d Extraord. Sess., ch. 57.

[5] Holding that legislative reapportionment was primarily a legislative responsibility, the District Court declined to order its own plan and gave the Legislature until December 1, 1966 to enact a constitutional plan. 256 F. Supp. at 968.

[6] Miss. Laws, 1966-67, Sp. Sess., ch. 41.

[7] In the House plan, 65% of the districts (34 of 52) were multi-member and floterial districts, electing 85 percent of the House membership (104 of 122 representatives). In the Senate plan, 28 percent of the districts (10 of 36) were multi-member and floterial districts, electing 50 percent of the Senate membership (26 of 52 senators). 265 F. Supp. at 495-97.

As used in the District Court's plans, floterial districts are a special form of multi-member district in which one or more legislators are elected from subdistricts (usually a county) and one or more legislators are elected districtwide (usually from two or more counties). See R. Dixon, DEMOCRATIC REPRESENTATION 461 *passim* (1968).

districts) and 23.24% in the Senate (excluding floterial districts).[8]

In the 1967 legislative elections—in a state which was then 42% black (1960 Census)—only one black representative was elected to the 122-member House, and no black candidates were elected to the 52-member Senate.[9]

In 1971 the Mississippi Legislature enacted another legislative reapportionment plan,[10] but this plan was also struck down by the District Court on May 18, 1971 for malapportionment, and another court-ordered plan was formulated for the 1971 legislative elections. *Connor* v. *Johnson,* 330 F. Supp. 506 (S.D. Miss. 1971), *vacated and remanded sub nom. Connor* v. *Williams,* 404 U.S. 549 (1972). In the 1971 court-ordered plan, a majority of both houses of the Mississippi Legislature were elected from multi-member and floterial districts.[11] The court-ordered districts also were malap-

[8] 265 F. Supp. at 504-07. The span of variances in the House plan was from +9.695% (District 1) to —11.140% (District 20), and in the Senate from +12.546% (District 18) to —10.691% (District 27). Twenty-four of the 52 House districts, and 24 of the 36 Senate districts had variances exceeding 5%, plus or minus. *Id.*

[9] Rep. Robert Clark, of Holmes County, was the state's only black legislator from 1967 to 1975. Hearing of May 7, 1975, Ex. P-10 (deposition of Rims Barber, Associate Director of Delta Ministry), p. 18 (App. Vol. I, p. 231).

[10] Miss. Code Ann. §§ 5-1-1, 5-1-3 (1972).

[11] In the House plan, 72% of the districts (33 out of 46) were multi-member and floterial districts, electing 89% of the House membership (109 out of 122 representatives). In the Senate plan, 42% of the districts were multi-member and floterial districts, electing 62% of the Senate membership (33 out of 52 senators). 330 F. Supp. at 509-17.

portioned by total deviations in the House of 62.96% including floterial districts and 19.73% excluding floterial districts, and in the Senate of 20.29% including the floterial district and 18.90% excluding the floterial district.[12]

On appeal, holding that "when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter," *Connor* v. *Johnson,* 402 U.S. 690, 692 (1971), this Court stayed the 1971 court-ordered plan and instructed the District Court "absent insurmountable difficulties, to devise and put into effect a single-member district plan for Hinds County" by June 14, 1971. *Id.* at 692. The District Court did not divide Hinds County into single-member districts, finding that "with the time left available it is a matter of sheer impossibility to obtain dependable data, population figures, boundary locations, etc." *Connor* v. *Johnson,* 330 F. Supp. 521, 522 (S.D. Miss. 1971). This Court denied plaintiffs' subsequent application for further interim relief. 403 U.S. 928 (1971).

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[12] For an explanation of the calculation of the variances of the floterial districts, see Hearing of May 7, 1975, Ex. P-6 (deposition of Harold E. Sweeney, Jr., Assistant Professor of Political Science, Shippensburg State College, Pa.), pp. 10-21, (App., Vol. I, pp. 76-82), Dep. Ex. 1. Mr. Sweeney's calculations of variances in the floterial districts were uncontradicted.

Calculations of variances in nonfloterial districts are in the District Court's opinion, 330 F. Supp. at 509-16. The span of variances (excluding floterial districts) in the House plan was from +9.906% (District 3) to —9.823% (District 18), and in the Senate plan from +9.584% (District 29) to —9.319% (District 19). *Id.* Seven of the 46 House districts and 9 of the 33 Senate districts had variances over 8%, plus or minus. Half of the House Districts and 55% of the Senate districts had variances over 5%, plus or minus.

In the 1971 legislative elections held under the District Court's plan—in a state which was then 37% black (1970 Census)—29 black candidates ran for the Mississippi Legislature and 28 were defeated.[13] Of the 28 who were defeated, 24 ran in the multi-member districts contained in the District Court's 1971 plan.[14]

On January 24, 1972, on the merits of plaintiffs' appeal from the District Court's 1971 judgment, this Court withheld final decision on the constitutionality of the District Court's 1971 plan as a permanent reapportionment plan because the District Court's deliberations were incomplete and "it would be preferable to have before us a final judgment with respect to the entire State." *Connor* v. *Williams,* 404 U.S. 549, 551-52. Noting that the District Court had retained jurisdiction of the multi-member legislative districts for Hinds, Harrison, and Jackson Counties, and had stated its intention to appoint a special master as of January 1, 1972, to "make findings" concerning the feasibility of subdividing those counties into single-member districts (330 F. Supp. at 519), this Court directed:

> "Such proceedings should go forward and be promptly concluded, for, as this Court has emphasized, 'when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter.' Connor v. Johnson, 402 U.S. 690, 692." *Id.* at 551.

The judgment of the District Court embodying the 1971 court plan was vacated, except insofar as it ap-

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[13] Hearing of May 7, 1975, Exs. P-1, P-5.

[14] *Id.*

plied to the 1971 legislative elections, and the case remanded to the District Court "for further proceedings consistent with this opinion." *Id.* at 552. On remand, the District Court did not appoint a special master.

In 1973 the Mississippi Legislature enacted two legislative reapportionment plans, both based on the 1971 court-ordered plan.[15] The District Court held a hearing on plaintiffs' objections to the latter, enacted in April 1973, on February 7, 1975.

Before a decision was rendered, the Mississippi Legislature in April 1975 enacted another reapportionment plan [16] which was identical to the District Court's 1971 plan except for the House districts in Hinds, Harrison, Jackson, and George Counties.[17] Pursuant to order of the District Court, plaintiffs on April 15, 1975 filed an amended complaint (App., Vol. I, pp. 54-69) alleging that the 1975 legislative reapportionment plan enacted by the Mississippi Legislature denied them rights secured by the Fourteenth and Fifteenth Amendments and 42 U.S.C. §§ 1971, 1973 et. seq., and 1983. Jurisdiction of the amended complaint was based on 28 U.S.C. §§ 1331, 1343, and 2281, and 42 U.S.C. §§ 1971 (d), 1973c, and 1973j(f). For relief, plaintiffs asked the District Court to adopt and implement a legislative redistricting plan providing single-member districts statewide prior to the 1975 legislative elections.

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[15] Miss. Laws, 1973, Chs. 304, 305, enacted in February, 1973, and Miss. Laws, 1973, Chs. 456, 457, enacted in April, 1973.

[16] Miss. Laws, 1975, chs. 484, 510; Miss. Code Ann. §§ 5-1-1, 5-1-3 (Supp. 1976).

[17] Miss. Code Ann. § 5-1-3 (Supp. 1976), Districts 31, 45, and 46. Representatives were to be elected from supervisors' districts in Hinds and Harrison County, and in Jackson and George Counties subdistrict residency requirements were established.

A hearing was held on May 7, 1975, and despite plaintiffs' objections and proof that the multi-member districts unconstitutionally diluted black voting strength [18] and that the plan was unconstitutionally malapportioned, and despite plaintiffs' presentation of alternative plans providing greater equality of population based both on county boundaries [19] and Census enumeration districts,[20] the District Court on May 20, 1975 sustained the constitutionality of the 1975 enact-

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[18] Hearing of May 7, 1975, Transcript (App., Vol. II, pp. 1-127) and Exs. P-1 through P-17, P-26 through P-31. No witnesses testified for the defendants.

[19] The Mississippi Legislature's Interim Study Committee on Legislature Reapportionment in 1973 had recommended, but the Legislature had rejected, plans based exclusively on county boundaries which would have reduced the total deviations to 14.7% in the House and 12.8% in the Senate (Ex. P-2). Further, a computer analysis of Mississippi legislative districts performed by Dr. Gordon G. Henderson, Professor of Political Science at Tougaloo College, Mississippi, showed that even keeping county lines intact, and keeping combinations of counties to a minimum, districts could be drawn for both houses with minimum total deviations of only 10.62% for the House and 10.51% for the Senate (Tr. 81-97, (App., Vol. II, pp. 5-14), Exs. P-8, P-27). No witnesses were presented by the defendants, nor any justification advanced for the Legislature's preference for districts providing less equality of population.

[20] Census enumeration districts are the smallest geographical units for which the Bureau of the Census publishes population statistics (except for city blocks in large urban areas). See *Sims* v. *Amos*, 336 F. Supp. 924, 936 (M.D. Ala. 1972), aff'd, 409 U.S. 942 (1972).

The first plan (App., Vol. I, pp. 325-59), devised by Dr. David Valinsky of the City University of New York who drafted the plan approved in *Sims* v. *Amos*, *supra*, provided single-member legislative districts statewide with no district exceeding a variance of 3.09%. The House districts ranged from +3.09% to —2.30%, for a total deviation of only 5.39%. The Senate districts ranged from +1.66% to —1.73%, for a total deviation of only 3.39%. Dr. Valinsky testified that the center of each proposed district was randomly deter-

ments. *Connor* v. *Waller,* 396 F. Supp. 1308 (S.D. Miss.), *rev'd,* 421 U.S. 656 (1975). On June 5, 1975, this Court reversed, 421 U.S. 656, holding that the new laws "are not now and will not be effective as laws until and unless cleared pursuant to § 5" of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and holding further that the District Court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." *Id.* This Court expressly stated, however, that the reversal was

> "without prejudice to the authority of the District Court, if it should become appropriate, to entertain a proceeding to require the conduct of the 1975 elections pursuant to this Court's decisions in *Mahan* v. *Howell,* 410 U.S. 315 (1973), *Connor* v. *Williams,* 404 U.S. 549 (1972), and *Chapman* v. *Meier,* 420 U.S. 1 (1975)." *Id.*

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mined, and the districts were drawn without regard to race or the location of racial concentrations (App., Vol I, pp. 281-324). According to statistics presented by the Department of Justice, the Valinsky plan provided 7 districts with black voting age population majorities in the Senate and 23 districts with black voting age population majorities in the House.

The second plan (App., Vol. I, pp. 410-35), drafted by Henry J. Kirksey, a cartographer who is one of the plaintiffs in the case, provided House districts which ranged from +2.96% to —2.79%, for a total House deviation of only 5.75%, and Senate districts which ranged from +2.39% to —2.62%, for a total Senate deviation of only 5.01%. Mr. Kirksey testified that in drafting his plan he located concentrations of black population and drew the district boundaries in such a way as to avoid fragmenting or dispersing black population concentrations. (Ex. P-25 (App., Vol. I, pp. 360-409). According to statistics presented by the Department of Justice, the Kirksey plan provided 7 districts with black voting age population majorities in the Senate and 26 districts with black voting age population majorities in the House.

The Legislature's 1975 plan was then submitted to the United States Attorney General for Section 5 review, and on June 10, 1975 the Attorney General objected to the Legislature's 1975 plan for failure to prove that the plan did not have a racially discriminatory purpose or effect.[21]

On June 11, 1975, the District Court granted the motion of the United States to intervene as plaintiff-intervenor.

B. The District Court's Temporary 1975 Plan.

The District Court held a hearing on June 20, 1975, and despite the Attorney General's Section 5 objection and despite the fact that an almost identical court-ordered plan had been vacated by this Court in 1972, the District Court on July 11, 1975 ordered the Legislature's 1975 reapportionment plan into effect as "Temporary Districts for the Election of Senators and Representatives in the Mississippi Legislature for the Year 1975 Only." [22] The Court changed only one multi-mem-

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[21] The objection stated:

"We have given careful consideration to these statutes and other relevant information which has come to our attention. On the basis of our analysis, part of which we outlined in our memorandum as amicus curiae filed June 3, 1975, with the United States Supreme Court in Connor v. Waller, No. A968, a copy of which you received, we are unable to conclude, as we must under the Voting Rights Act of 1965, that the implementation of H.B. 1290 and [S.B.] 2976 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. I must, therefore, on behalf of the Attorney General interpose an objection to the implementation of the redistricting plans contained in H.B. 1290 and S.B. 2976." Telegram from J. Stanley Pottinger, Assistant Attorney General, to A. F. Summer, Miss. Attorney General, June 10, 1975.

[22] Order of July 11, 1975, (App., Vol. II, pp. 207-38).

ber district in the Senate plan (Hinds County) and only six multi-member districts in the House plan.[23]

None of these changes reduced the excessively high variance from population equality, and numerous discriminatory multi-member and floterial districts remained.[24] For the House, 51 of the 84 districts established by the 1975 temporary court plan were multi-member and floterial districts, electing 73 percent of the House membership (89 out of 122 representatives).[25] For the Senate, 15 of the 39 districts were multi-member and floterial districts, electing 54 percent of

[23] For the Senate, District 22 in Hinds County was subdivided into single-member districts, with one senator elected from each of five supervisors' districts. *Id.* For the House, District 3 (Desoto and Marshall) was converted into a floterial district (two each from Desoto and Marshall, one at-large), District 28 (Madison and Rankin) was converted into two single-member districts and one multi-member district, District 31 (Hinds) was subdivided into twelve multi-member districts, Districts 43 (Pearl River and Stone) and 46 (Jackson and George) were subdivided into single-member districts, and District 45 (Harrison) was converted into a floterial district (one from each of five supervisors' districts, two at-large). *Id.*

[24] Plaintiffs' Motion to Alter or Amend Judgment, filed July 2, 1975 (App., Vol. II, pp. 239-51).

[25] *Id.* For the House plan, the remaining multi-member districts (number of representatives in parentheses) were: Districts 2 (2), 8 (2), 9 (2), 13 (2), 14 (3), 15 (4), 16 (2), 17 (3), 18 (2), 24 (4), 26 (2), 27 (2), 28B (2), 29 (2), 30 (3), 32 (2), 33 (2), 34 (2), 37 (2), 38 (2), 39 (4), 40 (3), 43 (2). The remaining floterial districts were: Districts 1, 1A, and 1B (3); 3, 3A, and 3B (3); 4, 4A, 4B, and 4C (5); 11, 11A, and 11B (4); 23, 23A, and 23B (5); 25, 25A, and 25B (3); 35, 35A, and 35B (3); 45, 45A, 45B, 45C, 45D, 45E (7).

the Senate membership (28 out of 52 senators).[26] The District Court itself noted that there were racial dilution problems with its plan in instances in which black majority counties were joined with white majority counties for districtwide white majorities (Order of July 11, 1975, App., Vol. II, pp. 212-26), but concluded that time and available data did not permit single-member districting in those areas prior to the 1975 legislative primary and general elections (*id.*).

However, in three separate orders the District Court held that no irreparable injury would result because when the permanent plan was formulated, special interim legislative elections would be ordered to cure any discrimination in the temporary 1975 plan.

(1) By Order of June 25, 1975 (App., Vol. II, pp. 178-80) issued prior to the promulgation of the 1975 court-ordered plan, the District Court indicated that it proposed to formulate "a temporary plan for the selection of Senators and Representatives for the 1975 election ONLY," that a permanent plan could not be formulated "because there is not enough time," (*id.*) and stated:

> "By entry of this order, the parties are judicially informed that this Court proposes without unnecessary delay to formulate a permanent plan for the election of legislators in the quadrennial elections of 1979. When that shall have been accomplished, special elections may be ordered in those

[26] *Id.* For the Senate plan, the remaining multi-member districts (number of senators in parentheses) were: Districts 1 (2), 4 (2), 6 (2), 11 (2), 12 (2), 15 (2), 19 (2), 24 (2), 25 (2), 30 (2), 32 (3), 33 (2). The remaining floterial districts were: Districts 27, 27A, and 27B (3).

legislative districts where required by law, equity, or the Constitution of the United States." App. Vol. II, p. 180.

(2) In its Order of July 8, 1975, the District Court held:

> "We have determined that no irreparable injury will occur by allowing the 1975 legislative elections to proceed under a temporary plan on the dates provided by law. If the permanent plan, later to be adopted manifests that the temporary plan has caused such an injury the same shall be corrected by special elections as provided by Mississippi law." Order of July 8, 1975 (App., Vol. II, p. 191).

(3) In response to plaintiffs' motion of July 21, 1975 to set a deadline for approval of a permanent legislative reapportionment plan and for special legislative elections, the District Court on August 1, 1975 stated its "firm determination" to have a permanent plan approved by February 1, 1976, and said:

> "As to all instances in which a special election may be required, the Court expects to direct that the same shall be held in conjunction with the 1976 Presidential election so far as to save the expense of special elections as far as possible." Order of August 1, 1975 (App., Vol. II, pp. 254-55).

Given these assurances, plaintiffs did not appeal from the District Court's temporary 1975 plan, despite their objections that the plan diluted black voting strength and was excessively malapportioned.[27] In the 1975 legislative elections—as a result of the creation of single-member House districts in Hinds County—three

[27] App., Vol. II, pp. 239-51.

additional black representatives were elected to the Mississippi House of Representatives. The 52-member Mississippi Senate remains all-white.

In its Order of July 11, 1975, the District Court also directed the parties within ninety days to file plans for the permanent reapportionment of the Mississippi Legislature (App., Vol. II, p. 237). These were to include plans providing for minimum practicable deviations from population norms without fracturing county boundaries, an alternative plan providing for minimum fracturing of county boundaries, and plans preferred by the parties which were consistent "with their view of the law" (*id.*). Pursuant to this order, proposed permanent plans were filed by the private plaintiffs and by the plaintiff-intervenor (App., Vol. III, pp. 1-77). Defendants submitted no new plans, proposing instead that the District Court permanently adopt its 1971 court-ordered plan as modified by the Mississippi Legislature in 1975, or alternatively, the District Court's temporary 1975 plan.[28]

Despite its assurances that a permanent court-ordered plan would be issued by February 1, 1976, the District Court on January 29, 1976 (App. Vol. III, pp. 79-80) stayed all further proceedings to await final decisions in three cases then pending in this Court.[29] On plaintiffs' petition for a writ of mandamus, joined by the United States, this Court granted the motion for leave to file the petition, indicated that there was "no

[28] *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (decided March 8, 1976); *Beer* v. *United States*, 425 U.S. 130 (decided March 30, 1976); and *United Jewish Organizations of Williamsburg* v. *Carey, cert. granted*, 423 U.S. 945 (1975) (No. 75-104).

[29] Defendants' Submission Pursuant to Order, filed Oct. 9, 1975.

justification on the ground stated for delaying further a final decision in this long-pending case," *Connor* v. *Coleman,* 425 U.S. 675, 677 (1976), and instructed the District Court

> "to 'bring this case to trial forthwith . . .' and schedule a hearing to be held within 30 days on all proposed permanent reapportionment plans to the end of entering a final judgment embodying a permanent plan reapportioning the Mississippi Legislature in accordance with law to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter." *Id.* at 678.

A final hearing was held June 15, 1976.

C. The District Court's Permanent Plan.

On August 24 and September 8, 1976 the District Court promulgated court-ordered plans for the Mississippi Senate and House of Representatives, respectively, providing for both houses single-member districts statewide. 419 F. Supp. 1072, 1089 (App., Vol. III, pp. 94-138).

For its permanent plan, the District Court followed four basic criteria. First, following this Court's decisions in *Connor* v. *Williams, supra, Mahan* v. *Howell, supra,* and *Chapman* v. *Meier, supra,* the District Court established plans for both the Senate and House which provided single-member districts statewide. 419 F. Supp. at 1073, 1075, 1090. Second, noting that prior legislative districts had been delineated by county boundaries, and because of permanent voter registration, the

District Court determined to construct its legislative districts "primarily from counties, using beats [supervisors' districts] and precincts as necessary to approach or attain the required population norm." *Id.* at 1074. Any other plan, the District Court believed, would require a realignment of voting precincts and a reregistration of voters. *Id.* at 1075. Third, the District Court aimed at population variances which were "as near *de minimis* as possible," (*id.* at 1076), although it recognized that following county, supervisors' district, and precinct boundaries "has necessitated greater variances in population percentages in some instances than ordinarily would have been preferred" (*id.*). Fourth, the District Court determined:

> "There shall be no minimization or cancellation of black voting strength. Any apparent dilution in any particular locality will occur only when dictated by the necessity for drawing district lines so as to adhere as closely as possible to the population norm while maintaining contiguity and a reasonable degree of compactness." *Id.*

Although the District Court in its Opinion of June 15, 1976 stated: "The plan to be formulated by the Court will be based on the official returns of the 1970 Census" (App., Vol. III, p. 88), the court's districts were devised not on the basis of 1970 Census population statistics, but rather from the votes received by the Democratic candidates for Governor in the August 5, 1975 Democratic primary election.[30]

With the promulgation of its plan, the District Court ordered the parties to submit proposals for special leg-

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[30] 419 F. Supp. 1072, 1087; Analysis by Special Master of Plaintiffs' Objections, filed December 20, 1976 (App., Vol. III, pp. 261-62).

islative elections to be held prior to the regular 1979 legislative elections. 419 F. Supp. at 1082, 1114. Plaintiffs proposed that the District Court order special elections in 10 new Senate districts and 41 new House districts which included in the Senate and House all majority black districts created by the District Court's new plan, several Senate and House districts which were excessively malapportioned in the temporary 1975 plan, and in the House, districts which in the new plan have no incumbent representatives and districts which have two incumbent representatives residing in the same new districts. (App., Vol. III, pp. 139-41, 146-59). The Department of Justice proposed special elections in 8 new Senate districts and 29 new House districts, which included new black majority districts carved out of the old multi-member districts in which the percentage of blacks had increased, and single-member districts which previously were majority white and which under the new plan have black voting age population majorities (App., Vol. III, pp. 142-45, 169-73). Defendants resisted any special legislative elections.[31]

Plaintiffs also on September 20 and October 8, 1976 filed objections and motions to alter or amend the District Court's judgment (App., Vol. III, pp. 160-68, 182-96). Plaintiffs contended that the District Court's Senate plan, with a total deviation of 18.32% (later reduced to 16.5%) was excessively malapportioned, and in certain districts diluted black voting strength. As an alternative plan, plaintiffs proposed a modification of a county boundary plan presented to the Court in

[31] Defendants' Submission Pursuant to Order, filed Sept. 8, 1976; Defendants' Submission Pursuant to Order and Objections to Request for Special Elections, filed Sept. 23, 1976.

1975, termed the Modified Henderson County Boundary Plan (App., Vol. III, pp. 186-90), which adhered to the criteria preferred by the District Court (single-member districts based on counties, beats, and precincts), but which provided a total deviation of only 13.66% from population equality, fractured fewer county lines by splitting up only 15 counties (as opposed to 19 counties in the District Court's plan), and which cured the dilution of black voting strength pointed out in plaintiffs' objections.

Plaintiffs also objected to nine districts in the District Court's House plan, and provided alternative plans which provided smaller variances from population equality and which remedied plaintiffs' objections to dilution and fragmentation of black voting strength pointed out in plaintiffs' objections (*id.*, pp. 191-96).

The Department of Justice on October 22, 1976 filed objections of racial dilution to the Senate plan, proposing as an alternative either the Modified Henderson Plan or a modification of one of their own proposed plans, and objections to 34 House districts (and "comments" on 7 more), proposing either plaintiffs' alternatives or alternatives drafted by the Department (App., Vol. III, pp. 206-19).

On November 12, 1976 the District Court rendered an opinion (App., Vol. III, pp. 220-31) disposing of private plaintiffs' and plaintiff-intervenors' objections and proposals for special elections, and private plaintiffs' motion for attorney's fees.[32]

[32] Plaintiffs' Motion for an Award of Attorney's Fees, filed June 15, 1976, attached hereto as Appendix A, *infra*. The motion was based on the 1975 amendments to the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(e), 89 Stat. 404.

On plaintiffs' objections to the plan, the District Court revised 11 House districts "to improve upon discrepancies involving contiguity and population" (*id.* p. 221), although none of the alternatives suggested by the private plaintiffs or plaintiff-intervenor were accepted. The District Court failed to state any reasons for its rejection of the Modified Henderson Plan for the Senate, or for its rejections of plaintiffs' proposed alternatives for the House.

On special elections, the District Court held that the Mississippi Legislature's 1975 plan was not unconstitutional, and that the District Court's temporary 1975 plan "comported with all pertinent Constitutional standards" (*id.*, p. 223). The District Court then held plaintiffs to the constitutional standard announced by this Court in *White* v. *Regester,* 412 U.S. 755 (1973), of proving that plaintiffs had been denied equal access to the political process, and held that plaintiffs had not met that burden (*id.*, p. 225). The court then refused to order any special election relief in any "new districts with black population majorities [which] participated in the 1975 elections in districts which had black population majorities at that time" (*id.*, p. 228). Under the criteria enunciated by the court, five new House districts (Districts 3, 52, 79, 81, and 97) were held to qualify for consideration (*id.*, pp. 226-28). The Court then refused to order special elections in two (Districts 52 and 81), stating that this would require special elections in adjoining districts (*id.*, pp. 226-28), and in a third (District 3) because a black candidate lost to a white candidate in the 1975 elections (although voting was countywide in the 1975 district) (*id.*, p. 228). Special elections thus were ordered in only two new House districts (Districts 79 and 97), but the court

refrained "from setting dates for special legislative elections until time for an appeal has expired or until the Supreme Court shall have decided an appeal on the merits" (*id.*, p. 230).

On costs and attorneys' fees, the District Court taxed costs against the defendants, but refused to award plaintiffs their attorneys' fees:

> "The Court has heretofore found that the Mississippi Legislature made a good faith effort to reapportion itself in 1973 and 1975. The 1975 effort was upheld by this Court but failed on account of the disapproval of the Attorney General of the United States. We are thus of the opinion that no attorneys' fees are allowable in this case." *Id.*, p. 230.

The District Court on November 18, 1976 entered final judgment conforming to its prior opinions (App., Vol. III, pp. 232-48). Private plaintiffs on the same day filed a notice of appeal from paragraphs 7 and 8 of the final judgment concerning special elections (*id.*, p. 249), and on November 19, 1976 filed an application with this Court for special elections in 24 House districts and for postponement of the regular session of the Mississippi Legislature scheduled to commence January 4, 1977 (Application, *Connor* v. *Finch,* No. 76-777 (No. A-421)). On December 8, 1976, this Court noted probable jurisdiction of plaintiffs' appeal and expedited the appeal, but denied the other relief requested (*Connor* v. *Finch*, No. A-421, App., Vol. III, p. 259).

On November 29, 1976, private plaintiffs filed a timely motion to alter or amend the final judgment reiterating their prior objections to the District Court's Senate districts and certain House districts (*id.*, p. 250).

On December 21, 1976, after receipt of a special master's report discussing those objections (*id.*, p. 260),[33] the District Court entered an Order Amending Previous Judgment in which it revised two Senate districts (reducing the total deviation of the Senate plan to 16.5%) and nine House districts (*id.*, pp. 279-82).

Private plaintiffs then filed their notice of appeal from the entire final judgment, as amended, on December 27, 1976 (*id.*, p. 283), and on December 28, 1976 and December 30, 1976, notices of appeal were filed by the United States (*id.*, p. 283) and by the defendants (J.S., *Finch* v. *Connor,* No. 76-933, App. F, p. 81a).

ARGUMENT

SUMMARY OF ARGUMENT

1. Although Mississippi is 36.8 percent black and has a higher percentage of blacks than any other state. since 1900 only four black legislators have been elected to the 122-member Mississippi House of Representatives and no blacks have been elected to the 52-member Mississippi Senate. This systematic exclusion of blacks from the Mississippi Legislature is the result, first, of the deliberate disfranchisement of black citizens by state authorities up to the passage of the Voting Rights Act of 1965, and second, of the imposition by the District Court in this case of discriminatory multi-member districts and countywide voting for legislative office for the 1967, 1971, and 1975 state legislative elections. As a result, black citizens in Mississippi to date have been denied equal access to the political process in state legislative elections.

[33] No hearing was held on the Special Master's report.

2. Although the District Court by its last judgment promulgated a permanent plan which provides single-member districts statewide for both houses of the Mississippi Legislature, the District Court's plan does not fully meet constitutional requirements for court-ordered legislative reapportionment plans. The District Court's Senate plan is excessively malapportioned by a total deviation of 16.5%, and 11 Senate districts unnecessarily minimize and cancel out black voting strength. The District Court's House plan likewise contains 11 House districts which unnecessarily minimize and cancel out black voting strength. Plaintiffs presented to the District Court—which the court rejected without any hearing or stated reasons—alternative plans which would have remedied the malapportionment in the Senate plan by reducing the total deviation to 13.66%, and which would have cu ed the dilution of black voting strength present in both the Senate plan and the House districts.

3. Despite the fact that the District Court's temporary 1975 plan for legislative elections (a) failed to conform to this Court's mandate on *Connor* v. *Waller,* 421 U.S. 656 (1975), (b) was based on the Mississippi Legislature's 1975 plan to which the Attorney General objected under the Voting Rights Act for racial discrimination, and (c) provided for the election of a majority of both houses of the Mississippi Legislature, from discriminatory multi-member and floterial districts, the District Court refused to order more than two special elections in two House districts to cure the defects of its 1975 plan. The result is to deny black voters who resided in discriminatory countywide and multi-member districts in the 1971 and 1975 elections the opportunity to elect legislators of their choice for another four years, and to perpetuate in office an im-

properly constituted state legislature elected under a constitutionally defective reapportionment plan until the next quadrennial elections in 1979. To remedy the discrimination of the temporary 1975 plan, the District Court should be directed to order special legislative elections in all majority black Senate and House districts in its permanent plan (except for six House districts), to be held at the earliest practicable date.

4. The District Court erred in denying plaintiffs their reasonable attorney's fees on a finding that the Mississippi Legislature had made a good faith effort to reapportion itself, because (a) all the proof in this case contradicts that finding, and (b) the finding is irrelevant because an award of attorney's fees in this case is authorized by both the 1975 amendments to the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(e), and the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641, under which prevailing parties "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).

I. MISSISSIPPI BLACKS HAVE BEEN DENIED EQUAL ACCESS TO THE POLITICAL PROCESS.

Mississippi is 36.8 percent black (1970 Census), yet from 1960 to 1975, only one black legislator was elected to the 122-member House of Representatives, and since 1900 no black has been elected to the 52-member Senate.[34] As a result of the creation of single-member districts for Hinds County in 1975, three additional black representatives, but no black senators, were

[34] Tr., May 7, 1975, p. 46.

elected.[35] Between 1900 and 1971, no black was nominated for the legislature in a party primary.[36]

This exclusion of blacks from the Mississippi Legislature reflects an historic pattern of deliberate exclusion of blacks from the effective exercise of their political rights secured by the Fourteenth and Fifteenth Amendments. Prior to the passage of the Voting Rights Act of 1965, eligible black citizens in Mississippi were almost completely disfranchised by the discriminatory constitutional interpretation and literacy tests for voter registration[37] and by the poll tax requirement[38] en-

[35] In contrast, other Southern and border states in which blacks make up a smaller percentage of the total population have many more black legislators:

State	% Black	Representatives No. Blacks/ Total Members	Senators No. Blacks/ Total Members
Georgia	25.9%	20/180	2/56
Maryland	17.8%	14/141	5/47
Alabama	26.2%	13/105	2/35
South Carolina	30.5%	13/124	0/46
Tennessee	15.8%	9/99	2/33
Louisiana	29.8%	9/105	1/39
Texas	12.5%	9/150	0/31

Joint Center for Political Studies, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS, Vol. 6, p. xi (August 1976).

[36] Tr., May 7, 1975, p. 46.

[37] Miss. Const., art. 12, § 244 (1890); Miss. Code Ann. § 3213 (1956 Recomp.); Miss. Code Ann. § 23-5-85 (1972), suspended by operation of § 4 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b. *See United States* v. *Mississippi*, 380 U.S. 128 (1965), *on remand*, 256 F. Supp. 344 (S.D. Miss. 1966); United States Commission on Civil Rights, VOTING IN MISSISSIPPI 4-6, 8-11, 13-18 (1965).

Prior to the Enactment of the Voting Rights Act, only 28,500 blacks, or 6.7% of those eligible, were registered to vote in Mississippi, as compared with 69.9% of the eligible whites. United States Commission on Civil Rights, POLITICAL PARTICIPATION 13 (1968).

[38] Miss. Const., art. 12, §§ 241, 243; Miss. Code Ann. §§ 3160, 3235 (1956 Recomp.), held unconstitutional in *United States* v.

acted in the Mississippi Constitutional Convention of 1890.[39] In addition, blacks were excluded from party affairs by the adoption in 1903 of the "white primary" rule by the State Democratic Executive Committee.[40] After the "white primary" was struck down, blacks were excluded from participation in party affairs by the party principles loyalty law[41] and the successive adoption by the Mississippi Democratic and Republican parties until 1972 of principles espousing segregation of the races.[42]

After the passage of the Voting Rights Act allowing Mississippi blacks to register and vote, the United States Attorney General was forced to dispatch Federal registrars (examiners) to 34 Mississippi counties —more than in any other southern state[43]—to enforce the guarantees of the Fifteenth Amendment.[44] In addition, Federal observers have been required to observe municipal, county, and state elections in most of these counties to protect Fifteenth Amendment rights and to insure that the votes of black voters are counted and included in the election returns.[45]

From 1890 to the present day, blacks in Mississippi have been effectively prevented from electing legislators of their choice. Fearing that its discriminatory franchise restrictions might be struck down by the Federal courts, the Mississippi Constitutional Convention of 1890 deliberately gerrymandered the state's legislative districts by subdividing counties with heavy black concentrations to carve out white majority single-member and two-member districts,[46] by increasing the number of representatives and allotting the increase to the white counties,[47] and by establishing three constitutional apportionment divisions which minimized represen-

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Mississippi, 11 Race Rel. L. Rep. 837 (S.D. Miss. 1966). See *Ratliff* v. *Beale*, 74 Miss. 247, 268, 20 So. 865, 869 (1896); VOTING IN MISSISSIPPI, *supra* n. 37, at 3-4, 18-19.

[39] For accounts of the black disenfranchisement in the convention, see VOTING IN MISSISSIPPI, *supra* n.37 at 3-6; A. D. Kirwan, REVOLT OF THE REDNECKS, ch. 7 (1965).

[40] VOTING IN MISSISSIPPI, *supra* n.37, at 6-8; Kirwan, *supra*, n.39, at 129-31; *see* Weeks, *The White Primary*, 8 Miss. L.J. 135 (1935).

[41] Miss. Code Ann. § 3129 (1956 Recomp.), which conditioned participation in party primaries on adherence to the principles of the political party adopted at the last state convention.

[42] VOTING IN MISSISSIPPI, *supra* n.37, at 7-8; POLITICAL PARTICIPATION, *supra* n.37, at 145-46. In addition, the predominantly white regular Mississippi delegations to the 1968 and 1972 Democratic National Conventions were denied their seats for exclusion of blacks and failure to follow party rules governing participation in precinct caucuses and county conventions to select delegates. See *Riddell* v. *National Democratic Party*, 508 F.2d 770 (5th Cir. 1975). State officials also unconstitutionally denied state recognition to the integrated Democratic Party faction recognized by the National Democratic Party. *Id.*

[43] *Hearings on Extension of the Voting Rights Act of 1965 Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 631-32 (1975).

[44] Tr. May 7, 1975, Ex. P-9 (deposition of J. Stanley Pottinger, Assistant Attorney General for civil rights, U.S. Department of Justice) (App., Vol. I, pp. 200-20).

[45] *Id.*

[46] Kirwan, *Apportionment in the Mississippi Constitution of 1890*, 14 J. Southern Hist. 234 (1948). The text of these constitutional provisions, and subsequent statutes subdividing counties in the House, are attached in Appendix B, *infra*.

[47] *Id.*; A. Kirwan, Revolt of the Rednecks, *supra*, at 79.

tation from black counties.[48] Just as the black registration and voting began to increase as a result of the passage of the Voting Rights Act, the District Court in this case in 1967, 1971, and 1975 perpetuated the exclusion of blacks from legislative office by adopting plans which provided for at-large voting in numerous multi-member districts, which combined majority black counties with more populous majority white counties for districtwide white majorities, and which required at-large countywide voting in counties with substantial black concentrations.[49] Racial dilution in these multi-member districts was enhanced by Miss. Code Ann. § 23-3-69 (1972) which requires a majority vote to win party primary elections, by Miss. Code Ann. § 3110 (1956 Recomp.) which prohibits single-shot voting for legislative candidates, and by the successive adoption by the District Court in its court-ordered plans of the "post" requirement limiting candidates for legislative office to a specified post on the ballot.[50]

Further, there is in Mississippi a pattern of bloc voting by race.[51] Whites will not vote for black candidates

[48] *Id.*; Leon A. Wilber, *Reapportionment of the Mississippi Legislature* 1-2 (1961).

[49] *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss. 1967); *Connor* v. *Johnson*, 330 F. Supp. 506 (S.D. Miss. 1971), *vacated and remanded sub nom. Connor* v. *Williams*, 404 U.S. 549 (1972). For a detailed description of the racial dilution effected by those plans, see J.S., *Connor* v. *Waller*, 421 U.S. 656 (1975), pp. 8-14; Plaintiffs' Motion to Alter or Amend Judgment, filed July 21, 1975 (App., Vol. II, pp. 239-51).

[50] 265 F. Supp. at 496, 498; 330 F. Supp. at 509.

[51] Hearing of May 7, 1975, Exs. P-7, P-8, and P-10, depositions of Dr. James W. Loewen (App., Vol. I, pp. 117-31), Dr. Gordon G. Henderson (*id.*, pp. 172-85), and Rims Barber (*id.*, pp. 221-80).

(*Footnote continued next page*)

or candidates identified with black interests.[52] Thus, in white majority districts, blacks and their allies cannot be nominated or elected, and coalitions between whites and blacks for the election of black candidates or candidates identified with black interests is effectively precluded.[53]

As a result of the systematic exclusion of blacks from legislative office, the Mississippi Legislature has continually demonstrated its unresponsiveness to the needs and interests of the black electorate.[54] Indeed, the state legislature has passed numerous statutes designed to prevent the election of black candidates to public office, including requiring at-large rather than ward elections for city officials, from beat to at-large election of county supervisors; increasing the qualifying requirements for independent candidates (most of whom since 1965 have been black); switching from election to appointment of county officials; making voter registration more difficult by requiring burdensome and harassing questions; and (three times) enacting the "open primary" law which abolishes party primaries and requires a majority vote to win the general election.[55] All

For example, in the 1971 general election, the correlation between black population of counties and the votes for Charles Evers, black candidate for Governor, was .93 (*id.*, p. 128), on a scale of —1.0 to +1.0 on which a correlation of .5 would be statistically significant (*id.*, pp. 122-23. *See also*, Loewen, *Cultural Geography and the Study of Mississippi History and Social Structure*, 2 The Mississippi Geographer 27 (Spring 1974).

[52] *Id.*

[53] App., Vol. I, pp. 131, 184.

[54] Tr., May 7, 1975, pp. 63-68, Ex. P-16.

[55] These statutes are collected in Appendix C, attached.

of these discriminatory election law changes, except for the 1972 voter registration form, have either been struck down by the courts as racially discriminatory or objected to by the United States Attorney General under Section 5 of the Voting Rights Act of 1965, as racially discriminatory in purpose and/or effect.[56]

In addition, blacks in Mississippi continue to suffer from the results of invidious discrimination in education,[57] employment,[58] housing, and other socio-economic conditions. Blacks in Mississippi have lower educational attainment, more unemployment, more dilapidated housing, and are disproportionately placed in blue collar, lower paying jobs.[59]

Due to past discrimination in voter registration and

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[56] Hearing of May 7, 1975, Ex. P-9, Pottinger dep. (App., Vol. I, pp. 200-20); Appendix C, attached.

[57] Most of Mississippi's school districts have been found to have operated dual, racially segregated systems, which required years of litigation to overcome. *See*, e.g., *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *United States* v. *Hinds County School Bd.*, 423 F.2d 1264 (5th Cir. 1969) (30 districts).

[58] Two Mississippi state agencies have been found guilty of racial discrimination in employment practices, *Wade* v. *Miss. Cooperative Extension Service*, 372 F. Supp. 126 (N.D. Miss. 1974), *aff'd in part, vac'd in part*, 528 F.2d 508 (5th Cir. 1976); *Morrow* v. *Crisler*, 491 F.2d 1053 (5th Cir. 1974) (Mississippi Highway Patrol). Other employment discrimination suits against state agencies are pending.

[59] Mississippi Office of Human Resources and Community Services, *The Extent and Distribution of Poverty in Mississippi* (June, 1976). Based on the 1970 Census and other, more recent data, the statistics in this study may be summarized on the following table:

(*Footnote continued next page*)

depressed socio-economic conditions,[60] disproportionately fewer eligible blacks than whites are registered to vote (66% of the eligible blacks as compared with 76% of the eligible whites)[61] or turn out at the polls on election day to cast ballots.[62]

As a result of these factors showing that Mississippi blacks have had "less opportunity than did other residents . . . to participate in the political processes and to elect legislators of their choice," *White* v. *Regester*, 412 U.S. 755, 766 (1973), the District Court was under a special burden to establish in its permanent plan districts which did not dilute black voting strength and which secured "full and effective participation by all

	White	Nonwhite
Persons below poverty level	17.9%	64.9%
Families with incomes below poverty level	16%	59.4%
Median family income	$8,420	$3,424
Median education, males 25 and over	12.1 yrs.	6.5 yrs.
Percent high school graduates	52.6%	14.9%
Infant mortality rate	17.0	35.6
Percent of family heads not in labor force	19.9%	33.4%
White collar,		
Males	38.5%	9.2%
Females	57.5%	22.0%
Blue Collar	56%	79%

[60] *See also*, Salamon & Van Evera, *Fear, Apathy, and Discrimination: A Test of Three Explanations of Political Participation*, 67 Am. Pol. Sci. Rev. 1288 (Dec. 1973), contending that fear still keeps Mississippi blacks from registering and voting.

[61] Mississippi Institute of Politics, *Voter Registration in Mississippi*, p. 2 (March, 1971) (Hearing of May 7, 1975, Ex. P-10, Barber dep., Dep. Ex. 2).

[62] Tr., May 7, 1975 (App., Vol. II, pp. 81-113).

citizens in state government," *Reynolds* v. *Sims*, 377 U.S. 533, 565 (1964), and to order a sufficient number of special elections to cure past discrimination.

Although the District Court erroneously denied the existence of these factors (Opinion of November 12, 1976, App., Vol. III, pp. 223-26), it did recognize that it had an obligation to establish districts in which "population variances are . . . as near *de minimis* as possible" (419 F. Supp. at 1076), and in which there is "no minimization or cancellation of black voting strength" (*id.*). However, in fashioning its Senate plan and in certain districts in its House plan, the District Court failed to conform to its own criteria.

II. THE DISTRICT COURT'S FINAL PLAN IS UNCONSTITUTIONALLY MALAPPORTIONED AND UNCONSTITUTIONALLY DILUTES BLACK VOTING STRENGTH IN CERTAIN DISTRICTS.

A. The District Court's Senate Plan Is Excessively Malapportioned and Unnecessarily Dilutes Black Voting Strength in Certain Districts.

Instead of starting on a fresh slate, the District Court in devising its single-member Senate plan in general simply subdivided the old multi-member districts in its 1971 plan.[63] As a result, the District Court began its efforts with districts containing excessively high variances from population equality (total deviation of 18.90%, excluding floterial districts) and which in many instances diluted black voting strength by combining majority black counties and majority white counties in districtwide white majorities.

According to the District Court's own figures, the District Court's Senate plan has a total deviation from

[63] Compare 330 F. Supp. at 509-12 *with* 419 F. Supp. at 1077-82.

population equality of 16.5%, with the largest variances occurring in District 6 (+ 8.2%) (419 F. Supp. at 1078) and in District 38 (— 8.3%) (*id.* at 1080.) Fifteen of the court's 52 Senate districts have variances from population equality of over 5%, plus or minus, and four have variances of 8% or over, plus or minus (419 F. Supp. at 1077-82).

In contrast, plaintiffs' Modified Henderson County Boundary Plan—also based exclusively on political subdivision boundaries—has a total deviation of only 13.66%, with the largest variances occurring in District 4 (+ 6.46%) and in District 45 (— 7.20%) (App., Vol. III, pp. 186-90).[64] Only 9 of the 52 districts have variances exceeding 5%, plus or minus, and none have variances exceeding 7.20% (*id.*).

Further, several of the District Court's Senate districts dilute and fragment black voting strength:

(1) In District 37 (419 F. Supp. at 1080) Claiborne County, which is 74% black[65] and has numerous countywide black elected officials, is combined with Beat 3 of Copiah County and with Lincoln County, which is 69% white, to create a single-member district which is 55.02% white (App., Vol. III, pp. 162-63, 207).

[64] A copy of the plan also is attached to J.S., *Connor* v. *Finch*, No. 76-935, App. pp. 19a-23a. This plan is merely a modification of the plan presented by Dr. Gordon G. Henderson derived from a computer study showing the lowest variances which could be achieved by combining whole counties. The Henderson plan was modified to subdivide all multi-member districts into single-member districts. See p. 13, n.19, *supra*.

[65] Population statistics are based on 1970 Census data. For political subdivisions altered since the 1970 Census, or for which 1970 Census data is not published, population statistics are estimates based on Census enumeration districts.

(2) In Districts 1 and 2 (419 F. Supp. at 1077), Marshall County, which is 61.98% black is split up and fragmented between more populous Desoto County, which is 64.75% white, and Lafayette County, which is 71.60% white, to create two white majority single-member districts (*id.*, pp. 163, 107).

(3) In District 11 (419 F. Supp. at 1078), Panola County, which is 51.26% black, is combined with majority white Yalobusha County (59.34% white) and Beat 3 of majority white Calhoun County to form a white majority district (*id.*).

(4) In District 22 (419 F. Supp. at 1079), majority black Noxubee County (65.77% black) is combined with more populous majority white Oktibbeha County (65.58% white) to create a white majority single-member district (*id.*).

(5) In District 39 (419 F. Supp. at 1080), majority black Wilkinson County (67.56% black) and Amite County (50.44% black) are combined with majority white Franklin County (61.13% white) and Beat 3 of Adams County (57.7% white) to form a single-member district, which although slightly majority black in population (51.3% black) is 56% white in voting age population (*id.*).[66]

(6) In Districts 31 through 35 (419 F. Supp. at 1080), the District Court employed as Senate districts

[66] Voting age population statistics, unless otherwise indicated, are based on the Mississippi State University study, E. Bryant and S. El-Attar, POPULATION OF MISSISSIPPI LEGISLATIVE AND CONGRESSIONAL DISTRICTS, 1970, AND PROJECTIONS TO 1975 (July, 1973) (Hearing of May 7, 1975, Ex. P-13). This voting age population study takes into account mortality and out-migration since 1970, and provides the most accurate and recent data available on voting age population for legislative districts.

the supervisors' districts of Hinds County, currently under challenge by black voters for racial dilution.[67] Prior to redistricting, Hinds County blacks had population and voting majorities in two supervisors' districts.[68] In 1969, the Hinds County Board of Supervisors enacted a redistricting plan which eliminated these two black beats and created white population and voting majorities in all five districts.[69] This plan subsequently was objected to by the United States Attorney General, for racial discrimination,[70] and invalidated by the District Court for unconstitutional malapportionment.[71] In 1973, the Board submitted, and the District Court approved, an "apple pie" plan based on the 1969 plan,[72] and the District Court in this case adopted this plan—still in litigation—for its Senate districts.

Census data show that the majority of black persons in Hinds County (69% of the total black population)

[67] *Kirksey* v. *Board of Supervisors of Hinds County*, 402 F. Supp. 658 (S.D. Miss. 1975), *aff'd*, 528 F.2d 536 (5th Cir. 1976), pending on rehearing *en banc*. Although the District Court sustained the constitutionality of the county redistricting, and a panel of the Fifth Circuit affirmed, the case is pending decision by the Fifth Circuit after oral argument on rehearing *en banc*. The record in the *Kirksey* case was incorporated into the record in this case.

[68] *Kirksey* Exs. P-37, P-38, plaintiffs' request for admissions and defendants' answers. District 2 was 76.26% black, and District 3 was 67.92% black. Also, *Kirksey* Ex. P-11, election returns for special congressional election in which black candidate Charles Evers received 65% of the vote in District 2 and almost half of the vote in District 3.

[69] *Kirksey* Ex. P-30.

[70] *Kirksey* Ex. P-20 (Pottinger dep.), Dep. Ex. E.

[71] *Kirksey* App. 28-31.

[72] *Kirksey* App. 37, the Board's plan.

reside in 48 contiguous, majority black Census enumeration districts in the central city of Jackson, the state capital.[73] All five districts in this county redistricting plan slice into this heavy black concentration, fragment it, and disperse portions of it among all five districts.[74] The districts are extremely distorted in shape—District 3 resembles a turkey, and District 4 a baby elephant.[75] Although two of the districts have slight black population majorities, all five districts are majority white in voting age population.[76] Because of racial bloc voting and the unwillingness of white voters to vote for black candidates or candidates allied with black interests,[77] Hinds County blacks—who constitute 39% of the total county population—are deprived of the opportunity to elect officials of their choice in any of the five districts.[78] See also, App., Vol. III, pp. 162, 163-64, 207-08.

Although the District Court's plan altogether provides 14 Senate districts which are majority black in

[73] *Kirksey* Exs. P-37, P-38. This area, shaped like a boot, is 92% black. *Id.*

[74] *Kirksey* Ex. P-44, map.

[75] These were the terms used by the District Court, 402 F. Supp. at 666. Instead of using natural boundaries or geographic landmarks to delineate district boundaries, the plan uses invisible land section lines in most of the county area outside Jackson. *Kirksey* App. 50, Figure 1.

[76] Blacks in District 2 constitute 53.4% of the total population, but only 48.0% of the voting age population (VAP) (1970 Census); blacks in District 5 constitute 54.0% of the total population, but only 48.6% of the VAP (1970 Census). The other three districts are 70.5%, 72.3%, and 68.0% white. *Kirksey* Exs. P-30, P-54; *Kirksey* App. 278-97, 379-92.

[77] *Kirksey* App. 322-26, 350-78.

[78] *Id.*, 325-26, 393.

population, only six districts are majority black in voting age population (*id.*, p. 164).

The Modified Henderson Plan avoids dilution of black voting strength in these districts.

(1) Claiborne County, instead of being combined with Copiah County, Beat 3, and Lincoln in a majority white district, instead is combined with Jefferson and Copiah in a district which does not fragment any county, which is 61.1% black, and which has a variance of only +3.51% (*id.*, p. 189).

(2) Marshall County, instead of being fragmented between two majority white districts, is combined with Tate in a district which is 55.6% black (*id.*, p. 186).

(3) Panola County, instead of being combined with Yalobusha and Calhoun, Beat 3, is instead combined with Quitman County in a district which does not fragment any county and is 53.5% black (*id.*).

(4) Noxubee County, instead of being combined with Oktibbeha, is instead combined with Winston and Lowndes County, Beat 4, in a district which is 54.5% black (*id.*, p. 187).

(5) Wilkinson and Amite Counties, instead of being combined with Franklin and Adams County, Beat 3, are instead combined with Pike County, Beats 1, 2, and 5, in a district which has a greater black majority (52.6% black) than under the District Court's own plan (*id.*, p. 138).

For Hinds County, plaintiffs presented their Census Trace Plan[79] based exclusively on 1970 Census tracts,

[79] Hearing of May 7, 1975, Ex. P-14.

which then conformed in the City of Jackson to voting precincts.[80] This plan provides five single-member Senate districts for Hinds County which do not fragment and disperse the heavy black concentration in central Jackson, and which includes two majority black districts which are 66.47% and 68.36% black in population.[81]

The Modified Henderson Plan, taken with the Hinds County Census Tract Plan, results in 15 majority black Senate districts (as compared with 14 in the District Court's plan); eight of those districts (as compared with only six in the District Court's plan) are majority black in voting age population.

Although the Modified Henderson Plan, and the Census Tract Plan for Hinds County, adhere more closely to the criteria established by the District Court than the District Court's own plan, are based on 1970 Census data, provide greater equality of population among the districts, contain less dilution of black voting strength, and cross fewer county lines, the District Court rejected these proposed alternatives without stating any reason or justification.

B. The District Court's House Plan Unnecessarily Dilutes Black Voting Strength in Certain Districts.

Plaintiffs did not object to the entire House plan, as they did the Senate plan, but only to certain districts in the House plan for fragmentation and dilution of black voting strength and excessive malapportionment. In its entirety the District Court's House plan—by providing

[80] *Kirksey* App. 235. These precincts have since been altered to accommodate the 1973 Hinds County redistricting plan.

[81] Hearing of May 7, 1975, Ex. P-14.

approximately 30 House districts which are majority black in population—goes a long way toward alleviating the dilution of black voting strength present in the 1971 and 1975 court-ordered plans. However, certain districts do not comply with the District Court's criteria of avoiding dilution of black voting strength and minimizing population variances.

(1) Washington and Issaquena Counties (House Districts 32, 33, 34, and 35). Washington County is 54% black and has 38,460 black people, the second largest black population of any county in the state.[82] According to 1970 Census data, the greatest proportion of the black population of Washington County is situated in north and west Greenville, the county seat.[83] The District Court's plan fragments this heavy black population concentration among four House districts.[84] District 35 is majority white; Districts 32, 33, and 34 are majority black in population, but less than 53% black in voting age population.[85] Given that throughout the

[82] U.S. Bureau of the Census, 1970 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: MISSISSIPPI, PC(1)-B26, Table 34, p. 26-86 (1971).

[83] Data on Census enumeration districts, by race, for each county in the state is stipulated, Hearing of May 7, 1975, Ex. P-1; Hearing of Feb. 7, 1975, Exs. P-1, P-2. Maps showing the boundaries of these enumeration districts were admitted in evidence as part of Exs. P-19 through P-22, Hearing of May 7, 1975.

[84] 419 F. Supp. at 1096-97. Based on estimates from 1970 Census data, the majority black precincts in Washington County are: Extension Building and Glen Allan (placed in District 32), Community Center, Arcola, and Hollandale (placed in District 33), Brent Center, Police Station, and New County Garage (placed in District 34), and Darlove, Bourbon, Industrial College, Leland Health Clinic, and Leland Light Plant (placed in District 35).

[85] Objections of the United States, filed Oct. 22, 1976 (App., Vol. III, p. 209).

state black registration is disproportionately lower than white registration, it is unlikely that black voters in Washington County can elect legislators of their choice in any of the five districts.

These districts also are malapportioned. Although the District Court's statistics, calculated from the election returns for the 1975 Democratic primary for Governor, indicate maximum variances of —4.2% for District 33 and +7.2% for District 34 (419 F. Supp. at 1096-97), plaintiffs' calculations based on 1970 Census enumeration districts indicate that the true population variances are —7.2% for District 33 and +11.0% for District 34, for a total deviation of 18.2% for these four districts.[86]

Plaintiffs presented to the District Court two alternative plans based on voting precincts—the population of which was calculated from 1970 Census enumeration districts—which would have avoided fractionating the heavy black population concentration in north and west Greenville, which would have provided districts in which black voters would have had an opportunity to elect legislators of their choice, and which would have reduced the excessive malapportionment to total deviations of 10.97% (Alternative 1) and 5.92% (Alternative 2).[87]

(2) Warren and Yazoo Counties (House Districts 47, 53, 54, 55, and 56). Warren County, which is 41%

[86] Plaintiffs' Motion to Alter or Amend Judgment, filed Nov. 29, 1976 (App., Vol. III, p. 253).

[87] Plaintiffs Supplement to Motion to Alter or Amend Judgment, filed Oct. 8, 1976 (App., Vol. III, pp. 193-94). Under Alternative 1, one district is majority white, and three districts are 55.13% black, 62.31%, and 65.93% black. Under Alternative 2, one district is majority white and three districts are 65.16% black, 66.48% black, and 63.04% black. *Id.*

black, contains 18,355 black people,[88] more than the 18,171 population required for a single-member House district. According to the 1970 Census, blacks in Warren County are most heavily concentrated in the City of Vicksburg, which contains 12,568 black persons, or 68.47% of the total black population of Warren County, and in the area just to the north of Vicksburg.[89] The three Warren County districts in the District Court's plan (Districts 53, 54, and 55) all slice into the heavy black population concentration in Vicksburg and north of Vicksburg and fragment it among all three districts.[90] According to the District Court's own figures, all three districts are majority white—District 53 is 57.5% white, District 54 is 58.2% white, and District 55 is 56.3% white[91]—thus depriving Warren County blacks of a majority in any of the Warren County districts.

Plaintiffs presented to the District Court an alternative plan (App., Vol. III, p. 196) based exclusively on voting precincts which, although providing slightly higher population variances, nevertheless does not fragment black voting strength in Warren County, and provides one district which is 59% black (*id.*).

(3) Adams County (House Districts 88 and 89). Adams County is 47.90% black and contains 17,865

[88] U.S. Bureau of the Census, 1970 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: MISSISSIPPI, PC(1)-B26, Table 34, p. 26-86 (1971).

[89] *Id.*, Table 27, p. 26-62.

[90] Order Amending Previous Judgment, filed Dec. 21, 1976 (App., Vol. III, pp. 281-82).

[91] *Id.*

black persons,[92] almost enough for an 18,171-person single-member district. According to the 1970 Census data, blacks are most heavily concentrated in the 11 majority black Census enumeration districts in north Natchez, the county seat, and in the northern part of Adams County.[93] The two Adams County districts in the District Court's plan split this heavy black population concentration so that one district (District 88) is 57.2% white, and the second district (District 89) has a black voting age population majority of only 50.7%.[94]

The Department of Justice presented to the District Court an alternative plan for Adams County which reduced the fractionalization and dilution of black voting strength and resulted in one district which had a black voting age population majority of 59.5% while maintaining a total deviation of less than 8%.[95]

As with plaintiffs' objections to the District Court's Senate plan, the District Court failed to hold a hearing on the objections of plaintiffs and plaintiff-intervenor to the court-ordered single-member House districts and failed to articulate any reasons why these

[92] U.S. Bureau of the Census, 1970 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: MISSISSIPPI, PC(1)-B26, Table 34, p. 26-84 (1971).

[93] Hearing of May 7, 1975, Exs. P-1, P-19 through P-22.

[94] Objections of the United States, filed Oct. 22, 1976 (App. Vol. III, pp. 210-11).

[95] *Id.* Plaintiffs also submitted an alternative plan which would have provided one black majority district. Plaintiffs' Supplemental Submission of Permanent Legislative Reapportionment Plans, filed Feb. 9, 1976, Exhibit 1 (Dist. 27).

proposed alternatives should not be accepted.[96] Because these proposed alternatives—like the District Court's districts—were based on county boundaries, supervisors' districts, and voting precincts, all of the proposed alternatives could have been accepted by the District Court without changing or affecting the boundaries of any other district.

C. Court-Ordered Legislative Reapportionment Plans Must Achieve the Greatest Practicable Equality of Population Among the Districts.

Although this Court has developed a more flexible standard for judging the constitutionality of legislative reapportionment plans promulgated by state legislatures, e.g., *Gaffney* v. *Cummings*, 412 U.S. 735 (1973); *White* v. *Regester*, 412 U.S. 755 (1973), the Court in this case and subsequent cases—in the exercise of its supervisory authority over District Courts—has developed a more rigid standard for judging the constitutionality of court-ordered plans. Thus, in *Chapman* v. *Meier*, 420 U.S. 1 (1975), this Court held: "A court-ordered plan . . . must be held to higher standards than a State's own plan" (*id.* at 26). In articulating the equal population standard to be applied to court-ordered plans, this Court stated:

> "With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features * * * [A] court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than de minimis variation. Where

[96] Although the special master, in his report filed Dec. 20, 1976, contested plaintiffs' contentions (App., Vol. III, pp. 261-78), no hearing was ever held on plaintiffs' objections.

> important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted." *Id.* at 26-27 (footnote omitted).

In *Chapman, supra,* this Court reversed a District Court decision adopting a court-ordered plan with a total deviation from population equality of 20.14% (*id.* at 21) over a plan prepared by a special master with a total deviation of only 5.95%, without providing any rationale for its rejection of the special master's (Ostenson) plan (*id.* at 26). The Court held that the excessively high deviation could not be justified by the absence of any claimed racial discrimination, by the sparse population of the state, nor by the division of the state by the Missouri River or the purported policy of maintaining political subdivision boundaries, since

> "a plan devised by Special Master Ostenson demonstrates that neither the Missouri River nor the policy of maintaining township lines prevents attaining a significantly lower population variance." *Id.* at 25 (footnote omitted).

The only justification presented by the District Court here for its own excessively high variances is the purported state policy of maintaining political subdivision boundaries (419 F. Supp. at 1074-76). "This," the District Court stated, "has necessitated greater variances in population percentages in some instances than ordinarily would have been preferred" (*id.* at 1076).

But this justification wholly fails to sustain the constitutionality of the District Court's plan. First, the

state policy characterized by the District Court is not nearly as rigid as the District Court states. Unlike other states, Mississippi has no express constitutional or statutory prohibition against breaking county lines for legislative reapportionment.[97] Nor has this been the unyielding practice. From 1890 to 1962 by constitutional provision or state statute at least 7 counties were subdivided for the election of at least 17 memmembers to the Mississippi House of Representatives.[98] Further, in legislatively enacted plans, and subsequently in District Court ordered plans, county lines have been violated in the formation of multi-county single-member, multi-member, and floterial districts which crossed county lines to combine two or more counties in a single district.[99] State officials themselves have stated that county lines should yield when necessary to secure effective and equal representation. On May 7, 1975, Governor William L. Waller, then a defendant in this case, stated that single-

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[97] In fact, Mississippi law expressly provides for representation in the legislature of "a city" or "part of a county." Miss. Code Ann. § 23-5-175 (1972) provides:

> "When a city or part of a county is entitled to separate representation in the legislature, the commissioners of election shall prepare for the election, and shall receive and canvass the returns, declare the result, and transmit it to the secretary of state, and act in all respects as in other elections."

[98] See Miss. Const. 1890, art. 13, § 254, ¶¶ 12, 13, 14, 15; Miss. Code Ann. § 3326 (1956 Recomp.). These constitutional provisions and state statutes subdividing counties for legislative representation are set out in Appendix B, *infra.*

[99] In addition, Mississippi has numerous school and other special purpose districts, such as county line school districts, consolidated school districts, and levee districts, which cross county lines and subdivide county areas. Hearing of May 7, 1975, Ex. P-10 (Barber dep.), pp. 83-90, Dep. Exs. 7, 8 (App., Vol. I, pp. 264-67).

member districts were inevitable and preferable even "if it takes a smaller geographical district that does cross county lines, then I'm personally in favor of the smaller geographic unit."[100]

But even granting that for practical reasons, political subdivision boundaries should be maintained, plaintiffs' Modified Henderson Plan provides single-member districts with a total deviation of only 13.66%, is based exclusively—like the District Court's own plan—on county boundaries, supervisors' districts, and voting precincts, and splits up only 15 counties. Thus, while the District Court articulated its rationale for preferring legislative districts defined by existing political boundaries rather than Census enumeration districts (419 F. Supp. at 1076), it failed entirely to justify its preference for its own Senate plan over plaintiffs' Modified Henderson Plan which complies with the same criteria as the court's plan, yet provides smaller population variances, breaks fewer county lines, is based on 1970 Census data, and eliminates the dilution of black voting strength contained in several of the District Court's Senate districts.

Because the District Court failed to adopt the Senate plan which provided the minimum population variance while still maintaining political subdivision boundaries, the District Court's Senate plan fails even to meet the standards established by this Court for evaluating malapportionment in plans formulated by state legislatures. Since the court plan has a total deviation of 16.5%, the plan is prima facie unconsti-

[100] The transcript of this statement was included in J.S., *Connor* v. *Waller*, *supra*, App. G, and added to the record in this case, Opinion of May 20, 1975, p. 66.

tutional, and the burden of justifying this excessive malapportionment was on the District Court. *Chapman* v. *Meier*, 420 U.S. 1, 24 (1975). But the District Court totally failed to articulate any rationale for preferring its Senate plan.

In *Kilgarlin* v. *Hill*, 386 U.S. 120 (1967), and *Swann* v. *Adams*, 385 U.S. 440 (1967), this Court reversed District Court judgments upholding the constitutionality of legislatively-enacted reapportionment plan providing total deviations of 26.48% and 25.65%. In *Kilgarlin*, the District Court justified the high deviation as "a bona fide attempt to conform to the state policy requiring legislative apportionment plans to respect county boundaries wherever possible" (386 U.S. at 122), but this Court in reversing held that the announced policy did not necessitate the high range of deviations, in part because "at least two other plans [were] presented to the court, which respected county lines but which produced substantially smaller deviations" (*id.* at 122). Similarly, in *Swann* the Court in reversing the District Court noted that "[t]he appellants themselves placed before the court their own plan which revealed much smaller variations between the districts than did the plan approved by the District Court" (385 U.S. at 445), and held that the plan could not be approved where there was no showing "that the difference [between the court-approved plan and equality of population] . . . is unavoidable or justified upon any legally acceptable grounds" (*id.* at 446).

D. Court-Ordered Legislative Reapportionment Plans Should Avoid Any Unnecessary Fragmentation or Dilution of Black Voting Strength.

Since "[a] court-ordered plan . . . must be held to higher standards than a State's own plan" (*Chapman*,

supra, at 26), it follows that any plan ordered into effect by a District Court must be strictly scrutinized to insure that dilution or fragmentation of black voting strength is scrupulously avoided. This is particularly true here, where because of past discrimination in voting and disfranchisement through discriminatory multi-member districts, the District Court was under an affirmative duty "to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965).

In *Chapman* this Court held that absent persuasive justifications, "a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts" (420 U.S. at 26-27) because of the "practical weaknesses inherent in such schemes" (*id.* at 15) and because of their potential for minimizing or cancelling out minority voting strength (*id.* at 17-19). By analogy, court-ordered single-member redistricting plans should avoid unnecessary dilution of black voting strength regardless of whether adoption of the same plan by a state legislature would have been unconstitutional.

This Court and the lower appellate courts have indicated that black voting strength is unconstitutionally minimized and cancelled out in single-member districts when heavy black population concentrations are unnecessarily fragmented and dispersed, or combined with heavier white population concentrations to create districtwide white majorities. In promulgating a court-ordered plan in *Taylor* v. *McKeithen,* 407 U.S. 191 (1972), the District Court rejected the state attorney general's plan for four senate seats in New

Orleans on grounds that it would "operate to diversify the Negro voting population throughout the four districts and thus significantly dilute their vote" and would practically eliminate "the possibility of a Negro being elected from any of the four districts," while the court approved plan would at least give blacks "a fair chance in two out of the four districts . . ." (*id.* at 193). When on appeal the Fifth Circuit reversed without opinion and adopted the attorney general's alternative division of New Orleans (*id.*), this Court vacated its judgment and remanded for a reasoned justification of its decision.

In two leading cases, the Fifth Circuit has held unconstitutional county redistricting plans which fragmented black voting strength. *Robinson* v. *Commissioners Court, Anderson County, Texas,* 505 F.2d 674 (5th Cir. 1974); *Moore* v. *Leflore County Bd. of Election Comm'rs,* 502 F.2d 621 (5th Cir. 1974). In *Robinson* the Fifth Circuit struck down a plan which—by means of irregularly shaped districts characterized as a "wedge" and a "peninsula" (505 F.2d at 679)—"diced" the heavy black concentration in southwest Palestine "into three parts, each in a different new precinct" (*id.* at 678) to "fragment what could otherwise be a cohesive voting community" (*id.* at 679). In *Moore,* the District Court struck down the Kellum Plan which

> "utilized narrow corridors to bring into southwest Greenwood [the heaviest black concentration, containing 44.2% of the county's black population] the lines of four districts (Beats 1, 2, 3, and 5), whereby the concentrations of black residents heretofore in Beat 3 were broken up and placed in those several districts." 361 F. Supp. 603, 604.

The District Court found that "the net result has been to dilute and fractionate the black voting strength in the election of public officials chosen in district balloting" (361 F. Supp. at 606). Despite the fact that all five resulting districts had black population majorities, the Fifth Circuit affirmed, noting that the Kellum Plan substantially reduced the proportion of blacks in all but one district and that "in terms of registered voters, blacks would have exceedingly slim majorities in some of these districts and minorities in others" (502 F.2d at 624, footnote omitted):

> "The mere existence of a black population majority does not preclude a finding of dilution. * * * The point is that against this background [prior history of racial discrimination affecting the right to vote], the Kellum Plan diluted the black vote; by retaining the barest of black population majorities, it enhanced the possibility of continued black political impotence." 502 F.2d at 624.

See also, *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965) (three-judge court).

Accordingly, there was no good reason, and the District Court failed to state any, why the District Court should have rejected—without even a hearing—the objections presented by the private plaintiffs and the Department of Justice that certain districts in its Senate and House plans diluted black voting strength, or the alternatives proposed by the parties which would have remedied this dilution. The question presented by these objections was not—as the District Court seemed to think [101]—whether plaintiffs had sustained their

[101] Opinion of Nov. 12, 1976 (App., Vol. III, pp. 223-26).

burden of proving lack of access to the political process under the standards of *White* v. *Regester*, 412 U.S. 755 (1973). But rather the question was whether in promulgating a court-ordered redistricting, the District Court abused its discretion in refusing to accept or grant a hearing on the plaintiffs' objections and alternative plans showing that the court's own districts effectuated an invidious dilution of black voting strength with the effect of depriving substantial black population concentrations—sufficiently large and compact to create majority black legislative districts—of the opportunity to elect legislators of their choice.

The District Court accepted the notion that because it was formulating a remedy, color-consciousness was required, cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971), when it adopted as one of its criteria: "There shall be no minimization or cancellation of black voting strength" (419 F. Supp. at 1076). A color-conscious remedy was particularly required in this case, since nondiscriminatory single-member legislative districts were necessary to remedy the decades of racial discrimination against black voters which has denied them effective legislative representation, first by denying them the right to vote, and then by denying them the opportunity to make their vote effective through at-large and multi-member district legislative voting. Color-conscious relief is necessary in redistricting cases because without a thorough understanding of the existence and location of minority voting strength, the trial court might well devise a remedy which would, in the words of the Fifth Circuit, "accomplish the same dilution as the original invalid apportionment." *Robinson* v. *Commissioners Court*, *supra*, 505 F.2d at 682. This is not to say that color-

consciousness makes blacks constitutionally entitled to a percentage of the population or vote in any particular district. It does mean that the remedy should be one which avoids the dilution of the invalid plan by avoiding, wherever possible, fragmentation and dilution of black voting strength.

The question is whether the court-ordered district "designedly or otherwise . . . operate to minimize or cancel out the *voting strength* of racial . . . elements of the voting population." *Burns* v. *Richardson,* 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey,* 379 U.S. 433, 439 (1965) (emphasis added). Because the relevant criterion of dilution is "voting strength," the existence of a black population majority in a particular district does not preclude a finding of dilution. *Zimmer* v. *McKeithen,* 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom. East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). Because of past exclusion from the electoral process, and because of depressed social and economic conditions, voter registration and electoral participation among blacks in Mississippi tends to be disproportionately lower than among whites (Section I, *supra*). Next, census statistics for Mississippi indicate that voting age whites comprise a disproportionately higher percentage of the population than blacks—two out of every three whites are of voting age (67.23%), but only one out of every two blacks (52.91%) is over 18 years of age.[102] Further, the most recent available registration statistics indicate that only 66% of the eligible blacks are registered to vote as compared with 76% of

[102] U.S. Bureau of the Census, 1970 CENSUS OF POPULATION, GENERAL POPULATION CHARACTERISTICS: MISSISSIPPI, PC(1)-B26, Table 22, pp. 26-53, 26-54 (1971).

the eligible whites.[103] Thus, simply because blacks may comprise a majority of the total population of a legislative district does not mean there is no dilution of black voting strength if, because of past discrimination and other socio-economic factors, blacks comprise a minority of the voting age population or registered voters.

Measured by these standards, and by the proof of other, nondiscriminatory alternatives to the districts ordered into effect by the District Court, certain districts in both the District Court's Senate and House plans unconstitutionally dilute black voting strength.

III. THE DISTRICT COURT ERRED IN REFUSING TO ORDER MORE THAN TWO SPECIAL ELECTIONS IN TWO HOUSE DISTRICTS.

All prior court-ordered reapportionment plans in this case—by employing multi-member districts and at-large voting—consistently have failed to conform to this Court's rulings in *Connor* v. *Williams,* 404 U.S. 549 (1972), and *Connor* v. *Waller,* 421 U.S. 656 (1975), that in court-ordered reapportionment plans single-member districts are to be preferred. The 1971 and 1975 legislative elections proceeded on the basis of court-ordered plans employing for a majority of both houses of the Mississippi Legislature multi-member districts and countywide voting which denied black voters the opportunity of effective participation in the political process. The temporary plan ordered into effect by the District Court for the 1975 legislative elections not only was almost identical to the 1971 plan previously vacated by this Court, but also was based on the 1975 plan enacted by the Mississippi Legislature

[103] Hearing of May 7, 1975, Ex. P-10 (Barber dep.), Dep. Ex. 2.

to which the Attorney General had objected under Section 5 of the Voting Rights Act of 1965 as racially discriminatory.

The 1975 plan is based on single-member districts statewide for the first time; it thus conforms in that respect to this Court's requirements for court-ordered plans. Yet, the District Court has nonetheless failed to effectuate all the relief possible under the 1976 plan by refusing to grant the special elections needed to correct the discrimination of black voting strength perpetuated in the 1971 and 1975 legislative elections, conducted under discriminatory reapportionment plans. The District Court's Final Judgment of November 18, 1976 determined that special elections were necessary in none of the 52 new Senate districts and only two of the 122 new single-member House districts.

Contrary to the specific directions of this Court in *Connor* v. *Coleman, supra,* that any special elections necessary be ordered "to coincide with the 1976 November Presidential and congressional elections, or in any event at the earliest practicable date thereafter," the lower court refused to order any special elections at all prior to the convening of the 1977 regular session of the Mississippi Legislature, instead preferring to stay special elections it felt necessary until the outcome of the instant appeal.

In 1971, on instructions from this Court to devise single-member legislative districts for Hinds County, *Connor* v. *Johnson,* 402 U.S. 690, 692 (1971), the District Court found as an "irrefragable fact" that there were "insurmountable difficulties" which prevented the division of Hinds County into single-member districts (330 F. Supp. 521, 523). What was impossible to accomplish in 1971 was accomplished in 1975 be-

tween June 10 (the date of the Attorney General's objection) and July 11. Hinds County was divided into single-member districts for House and Senate (Order of July 11, 1975, App., Vol. II, pp. 228, 233) and in the 1975 elections three black representatives were elected from the three black majority House districts, the first from Hinds County since Reconstruction. The District Court's erroneous 1971 finding thus prevented the election of black legislators and prevented the black voters of Hinds County from electing legislators of their choice for four years.

In 1975 this Court reversed the judgment of the District Court sustaining the constitutionality of the Mississippi Legislature's 1975 reapportionment plan, and directed the District Court

> "if it should become appropriate [after submission of the Legislature's plan under Section 5], to entertain a proceeding to require the conduct of the 1975 elections pursuant to a court-ordered reapportionment plan that complies with this Court's decisions in *Mahan* v. *Howell,* 410 U.S. 315 (1973), *Connor* v. *Williams,* 404 U.S. 549 (1972), and *Chapman* v. *Meier,* 420 U.S. 1 (1975)." *Connor* v. *Waller,* 421 U.S. 656.

The 1975 temporary court-ordered plan, ordered into effect after the Attorney General objected to the Mississippi legislation, failed to comply with this Court's decisions in *Mahan, Connor,* and *Chapman.* Seventy-three percent of the membership of the Mississippi House of Representatives and 54 percent of the membership of the Mississippi Senate were elected from multimember and floterial districts in a plan with total deviations from population equality of 19.73 percent in the House (excluding floterial districts) and 18.90 percent in the Senate (excluding the floterial district).

Now, the final judgment of the District Court, by denying any special election relief for all but two of the new single-member House districts created in the permanent plan, denies black voters who resided in discriminatory at-large and multi-member districts in the 1971 and 1975 elections the opportunity to elect legislators of their choice for another four years. The result is to perpetuate an improperly constituted state legislature and to deny black voters the opportunity to participate effectively in the electoral processes until 1979.

The voters of Mississippi have suffered for eleven years under court-ordered legislative reapportionment plans which failed to meet this Court's requirements for court-ordered plans and which in the face of an extensive past history of official discrimination affecting the right to vote in Mississippi, excluded black citizens from the opportunity to elect legislators of their choice. The permanent plan now ordered into effect by the District Court provides single-member districts statewide which replace the old discriminatory multi-member districts of prior plans. Now that this past dilution of black voting strength has been alleviated, special elections in these districts should be ordered without further delay. Justice has been denied by delay for the past twelve years of litigation in this case, and the injustice and inequities of past discrimination will be perpetuated unless this Court acts now to order additional special elections. Plaintiffs call upon this Court to intervene once again to secure plaintiffs' constitutional and legal rights, to grant plaintiffs full and effective relief to cure the discrimination of the District Court's prior multi-member district plans, and to effectuate its own order to the District Court to order "any necessary special elections" and to schedule those elections to be held "at the earliest practicable date."

A. Senate Districts.

The District Court refused to disturb the all-white Mississippi Senate by refusing to order any interim special elections in any of the new Senate districts, stating:

> "There is no justification for ordering special elections in any newly created senatorial district. Every such district with a black population majority was part of a black majority district in 1975. The only difference is that there no longer will be any multiple member districts." Opinion of November 12, 1976 (App., Vol. III, p. 226).

In finding that there was no discrimination in the 1975 temporary court-ordered Senate districts, the District Court relied upon its prior opinion of May 20, 1975, 396 F. Supp. 1308, sustaining the constitutionality of the Mississippi Legislature's 1975 reapportionment plan (*id.*, pp. 223-25).[104] In that opinion, the District Court had held that the Legislature's plan contained 8 black majority senatorial districts (according to 1970 Census data) electing a total of 12 senators (396 F. Supp. at 1326). However, the District Court ignored the evidence—uncontradicted and unimpeached in this record—that (1) projected 1975 voting age population (VAP) statistics indicated that by 1975 four of these Senate districts, electing five senators, had white

[104] This reliance by the District Court on its 1975 opinion was itself improper. In reversing the District Court's 1975 judgment, this Court held: "The District Court accordingly also erred in deciding the constitutional challenges to the Acts [the Mississippi Legislature's plan] based upon claims of racial discrimination." *Connor* v. *Waller*, 421 U.S. 656 (1975).

voting age population majorities,[105] and that (2) because of disproportionately lower black registration and turnout it was extremely difficult, if not impossible, for blacks to elect legislators of their choice in the remaining four districts.[106]

Under the District Court's new single-member Senate plan, 14 districts have black population majorities, and six of those districts have black 1975 VAP majorities.[107] Under plaintiffs' Modified Henderson Plan and Census Tract Plan for Hinds County, 15 Senate districts have black population majorities, and eight of those districts have black 1975 VAP majorities (*supra,* Section IIB)

B. House Districts.

The District Court found that there were five "newly created black majority districts, brought into existence where no black majority district previously

[105] E. Bryant and S. El-Attar, POPULATION OF MISSISSIPPI LEGISLATIVE AND CONGRESSIONAL DISTRICTS, 1970, AND PROJECTIONS TO 1975 (Mississippi State University, 1973) (Hearing of May 7, 1975, Ex. P-13). These districts were:

District	No. of Seats	Total Pop. % Black	1975 Voting Age Population % White	% Black
9	1	57%	54.33%	45.27%
13	1	58%	50.98%	49.02%
14	1	52%	58.45%	41.55%
25	2	53%	52.36%	47.37%

[106] Hearing of May 7, 1975, Tr. pp. 219-40 (App., Vol. II, pp. 81-113), Exs. P-30, P-31.

[107] Plaintiffs' Motion to Alter or Amend Judgment, filed Sept. 20, 1976 (App., Vol. III, p. 164); J.S., *Connor* v. *Finch,* No. 76-935, App. p. 6a.

existed." Opinion of November 12, 1976 (App., Vol. III, p. 226). The court ordered special elections in only two of these new majority black single-member districts (Districts 79 and 97). The District Court refused to order special elections in two of the new black districts (Districts 52 and 81), stating that this would require special elections in adjoining districts (*id.,* pp. 226-28), and in a third (District 3) because a black candidate lost to a white candidate in the 1975 elections (although voting was countywide in that district in the 1975 elections) (*id.,* p. 228).

The reasons stated by the District Court for refusing to order interim special elections in the three new majority black districts are totally inadequate:

District 52 (Noxubee County, Lowndes County: Crawford and Artesia Precincts). In both the 1971 and 1975 court-ordered plans, black voting strength in majority black Noxubee County (65.77% black) was completely cancelled out by combining Noxubee with more .populous majority white Lowndes County (67.07% white) and Oktibbeha County (64.58% white) in a floterial district and floterial subdistrict, both of which were majority white in population and which altogether elected five representatives.[108] Now blacks who constitute the majority population of Noxubee County have the opportunity to elect legislators of their choice in new District 52, a single-member dis-

[108] The total floterial district (Noxubee, Lowndes, and Oktibbeha) (District 23B), had a white population majority of 61.2% (1970 Census), and a white projected 1975 voting age population majority of 71.0% (Ex. P-13), and the subdistrict (Noxubee and Oktibbeha) (District 23A) had a white population majority of 54.4% (1970 Census), and a white projected 1975 voting age population majority of 66.6% (Ex. P-13).

trict in which blacks constitute 68.0% of the total population and 59.4% of the projected 1975 voting age population.

District 81 (Claiborne and Jefferson Counties). In both the 1971 and 1975 court-ordered plans, majority black Claiborne County (74.58% black) was combined with more populous, majority white Warren County (58.85% white) for the election of three representatives in a multi-member district which was 52.7% white in population (1970 Census) and 58.5% white in projected 1975 voting age population (Ex. P-13). Now for the first time blacks in Claiborne County—and adjoining majority black Jefferson County—have the opportunity to elect legislators of their choice in new District 81 which is 74.9% black in total population (1970 Census) and 69.9% black in 1975 voting age population (Ex. P-13).

Apparently, the District Court based its refusal to order special elections in these districts on the fact that neither of them has an incumbent representative. Thus, the District Court apparently reasoned, special elections in adjoining districts would be necessary to avoid increasing the membership of the House of Representatives. But this justification totally fails to outweigh the constitutional necessity of special election relief to remedy the unconstitutional dilution of black voting strength present in the prior discriminatory multi-member districts. The District Court clearly had the authority to authorize a slight increase in the House to meet constitutional requirements, *Minnesota State Senate* v. *Beens,* 406 U.S. 187, 199 (1972), and an increase of two representatives from black majority districts would not, as the District Court expressed (*id.,*

pp. 229-30), dilute the legislative voting strength of the presently sitting four black members.[109]

District 3 (Marshall County, Beats 1, 2, 3, and 4). In the 1971 plan, black voting strength in Marshall County (62.0% black) was cancelled out when Marshall was combined with more populous, majority white Desoto County (64.7% white) in a majority white (54.0% white) multi-member district electing three representatives (District 3). The District Court attempted to cure this dilution in the 1975 plan by giving Marshall one representative elected countywide, but this created a single-member district with 5,856 persons in excess of the norm (18,171), leaving Marshall County voters unconstitutionally underrepresented by a total variance of +32.23%. Now black voters in Marshall County have equal representation in new District 3 which is 67.2% black in total population (1970 Census) and 57.5% black in projected 1975 voting age population (Ex. P-13).

Here the District Court refused an interim special election because a black legislative candidate lost in 1975 in countywide voting. But the 1975 district was a different district than the new 1976 district. Black voters in Marshall County might well have believed that a black candidate did not have a chance of being elected to the legislature in countywide voting;[110] but

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[109] Alternatively, as we pointed out in our Application to Vacate Stay Entered by District Court Pending Appeal, if special elections are ordered in all majority black House districts in the permanent plan, only two additional special elections would be necessary to avoid increasing the membership of the House.

[110] The uncontradicted testimony in this case indicates that blacks in Mississippi do not vote when they believe they cannot influence the outcome of an election. Hearing of May 7, 1975, Ex. P-8 (Henderson dep.), pp. 49-50, Ex. P-10 (Barber dep.), p. 35.

the chances of black representation are increased when the candidate is running in only four supervisors' districts, all of which have black county officials on the district level.[111]

In discussing only these five districts, the District Court ignored the evidence that other multi-member and countywide districts in its 1975 plan discriminated against black voting strength. In old District 33, Adams County (51.9% white) elected two representatives countywide; new single-member District 89 consisting of part of Adams County under the District Court's plan has a slight black population majority of 53%, and plaintiff-intervenor and plaintiffs have suggested other alternative plans for that area which provide majority black districts. In *Moore* v. *Leflore County Board of Election Comm'rs,* 361 F. Supp. 603, 613-14 (N.D. Miss. 1972), aff'd, 502 F.2d 621 (5th Cir. 1974), the District Court in a county redistricting case held, in an opinion affirmed by the Fifth Circuit, that at-large, countywide voting in Leflore County unconstitutionally diluted black voting strength. Yet in the 1975 legislative election voting in Leflore County was at-large in a multi-county district (District 17) consisting of Leflore and Carroll Counties, electing three representatives, in a district with a 52.7% white projected 1975 voting age population majority (Ex. P-13).

In refusing to consider any other special elections for the House, the District Court referred to its 1975 decision, reversed by this Court, finding no unconstitutional dilution in its 1975 plan (Order of November 12, 1976, App., Vol. III, pp. 223-26). In that decision the District Court held that the Legislature's plan

[111] Joint Center for Political Studies, NATIONAL ROSTER OF BLACK ELECTED OFFICIALS, Vol. 6 (August, 1976).

contained 10 majority black House districts (based on 1970 Census data) electing 26 representatives (396 F. Supp. at 1326). But again, the District Court ignored the uncontradicted evidence that measured against projected 1975 VAP statistics (Ex. P-13), five of these House districts, electing 12 representatives, had white voting age population majorities,[112] and that because of disproportionately lower black registration and turnout it as extremely difficult, if not impossible, for black voters to elect legislators of their choice in three other districts, electing 9 representatives.[113]

Under the District Court's new single-member House plan, approximately 30 districts have black population majorities, and 21 of those districts have black 1975 VAP majorities. New Districts 48, 49, 57, 64, 65, and 67 either already had black representation or were majority black single-member districts in the 1975 plan; four of them are currently represented by black legislators. Hence, there is no need for special elections in those districts.

[112] Ex. P-13. These districts were:

Districts	No. of Seats	Total Pop. % Black	1975 Voting Age Population % White	% Black
12	1	60%	50.0%	50.0%
15	4	55%	50.6%	49.4%
17	3	57%	52.7%	47.3%
29	2	56%	52.9%	47.1%
34	2	54%	54.2%	45.8%

[113] Hearing of May 7, 1975, Tr. 219-40 (App., Vol. II, pp. 81-113), Exs. P-30, P-31.

C. Special Election Relief.

Given the magnitude of the deprivation—a majority of both houses of the Mississippi Legislature being elected from discriminatory multi-member and county-wide districts—and its length in time—spanning three legislative elections over a ten-year period, this Court should direct the District Court to order special legislative elections in all new single-member black majority districts—or at least districts with black voting age population majorities—in its permanent plan, except for those six House districts which either elected black representatives or were black majority single-member districts in the District Court's 1975 temporary plan.[114] Special elections should be ordered for both Senate and House districts. If this Court accepts plaintiffs' contentions that the District Court's Senate plan and certain districts in the District Court's House plan fail to meet constitutional requirements for court-ordered plans, and orders revisions in those plans, then the black majority districts in the revised plans should also be considered for special election relief. The Court should also direct that these special legislative elections be held "at the earliest practicable date," *Connor* v. *Coleman, supra,* 425 U.S. at 679.[115]

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[114] A listing of the House districts contained in the District Court's permanent plan, and racial composition of new and old districts, is contained in our Application to Vacate Stay Entered by the District Court Pending Appeal, *Connor* v. *Finch*, No. 76-777, p. 24. No special elections are necessary in new Districts 48, 49, 57, 64, 65, or 67.

[115] The District Court itself held: "Should special elections be ordered in any district, the same will be held only after fully adequate notice and *in time for the person elected to take his seat when the Legislature is convened in regular session in January, 1977.*" 419 F. Supp. at 1114 (emphasis added).

Given that the 1975 temporary plan violated this Court's mandate in *Connor* v. *Waller, supra,* was based on a legislative plan to which the Attorney General had objected for racial discrimination under Section 5 of the Voting Rights Act of 1965, and diluted black voting strength through multi-member districts and at-large voting, special elections are required. *Town of Sorrento* v. *Reine,* No. 75-93, decided April 26, 1976; *Hadnott* v. *Amos,* 394 U.S. 358 (1969).[116] The Mississippi Supreme Court itself has ordered special election relief when necessary to cure unlawful defects in regularly scheduled elections. See *Taylor* v. *Monroe County Board of Supervisors,* 421 F.2d 1038, 1042 (5th Cir. 1970). As previously indicated, the District Court made clear that its 1975 court-ordered plan established "Certain Temporary Districts for the Election of Senators and Representatives in the Mississippi Legislature for the Year 1975 Only" (App., Vol. II, p. 207). On three separate occasions the District Court indicated that special interim legislative elections would be ordered to cure any constitutional violations present in its temporary 1975 plan (*supra,* pp. 17-18). Thus, incumbent legislators ran for office in 1975 knowing that special elections might be ordered to cure the defects of the 1975 plan. Under these circumstances, "no office-holder has a vested

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[116] See also, *Toney* v. *White*, 488 F.2d 310 (5th Cir. 1973) (en banc); *Keller* v. *Gilliam*, 454 F.2d 55 (5th Cir. 1972); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455 (5th Cir. 1972) (Orde. of July 29, 1971), cert. denied, 407 U.S. 925 (1972); *Hall* v. *Issaquena County Board of Supervisors*, 453 F.2d 404 (5th Cir. 1971) (Order of July 29, 1971); *Taylor* v. *Monroe County Board of Supervisors*, 421 F.2d 1038, 1042 (5th Cir. 1970); *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir. 1966), cert. denied, 385 U.S. 851 (1966).

right in an unconstitutional office any more than he has a right to be elected to that office." *Reynolds* v. *State Election Board,* 233 F. Supp. 323, 330 (W. D. Okla. 1964) (three-judge court). See also, setting aside legislative elections or shortening the terms of legislative office, *Mann* v. *Davis,* 238 F. Supp. 458 (E.D. Va. 1964) (three-judge court), *aff'd,* 379 U.S. 694 (1965); *Moss* v. *Burkhart,* 220 F. Supp. 149 (W.D. Okla. 1963) (three-judge court), *aff'd sub nom. Williams* v. *Moss,* 378 U.S. 558 (1964); *W.M.C.A., Inc.* v. *Lomenzo,* Order of July 27, 1964 (unreported), *aff'd sub nom. Hughes* v. *W.M.C.A., Inc.,* 379 U.S. 694 (1965).

IV. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS THEIR REASONABLE ATTORNEYS' FEES.

Section 402 of the 1975 amendments to the Voting Rights Act of 1965, 89 Stat 404, 42 U.S.C. § 1973*l*(e), authorizes courts to award reasonable attorney's fees to the prevailing party "in any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment."[117] Since this action was brought to enforce the voting guarantees of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment, and since plaintiffs are the prevailing party—having succeeded in their efforts to invalidate each reapportionment plan enacted by the Mississippi Legislature and having succeeded in their goal of obtaining single-member legislative districts—plaintiffs are entitled to an award of reasonable attorney's fees under this Act.

[117] "That section would, of course, also authorize attorney's fees in cases brought under statutes designed to enforce or enacted under either or both of those amendments." 121 Cong. Rec. H 4720 (daily ed. June 2, 1975) (remarks of Cong. Edwards).

In its Opinion on November 12, 1976, the District Court awarded plaintiffs their taxable costs of the litigation, but denied plaintiffs' motion for an award of attorney's fees.[118]

Although plaintiffs' motion was based on the 1975 amendments to the Voting Rights Act, the District Court in its opinion failed to take note of this statutory authorization. Rather, the District Court stated only:

> "The Court has heretofore found that the Mississippi Legislature made a good faith effort to reapportion itself in 1973 and 1975. The 1975 effort was upheld by this Court but failed on account of the disapproval of the Attorney General of the United States. We are thus of the opinion that no attorneys' fees are allowable in this case." Opinion of November 12, 1976 (App., Vol. III, p. 230).

This justification is insufficient on two counts. First, the finding that the Legislature made a good faith effort to reapportion itself in 1973 and 1975 is clearly erroneous. In both 1973 and 1975 the Mississippi Legislature rejected reapportionment plans providing greater equality of population among the districts in favor of plans providing less equality of population and higher variances.[119] Further, the Legislature continued to enact plans under which a majority of both

[118] Plaintiffs' motion is reproduced herein as Appendix A, *infra.*

[119] See pp. 13-14, *supra.* At the Hearing of May 7, 1975, Dr. Henderson testified that based on his computer analysis of all the possible combinations of counties for legislative redistricting in Mississippi, there were "at least several hundred" possible alternatives which would have kept county boundaries intact and still have provided greater equality of population among the districts than the Mississippi Legislature's plans. Tr. 97 (App., Vol. II, p. 14).

houses were elected from multi-member and county-wide districts, despite plaintiffs' contentions that these multi-member districts diluted black voting strength. There is no evidence in this case to indicate that the Legislature made a good faith effort to avoid minimizing or cancelling out black voting strength. Moreover, the District Court's apparent reference to its Opinion of May 20, 1975 (396 F. Supp. 1308) sustaining the constitutionality of the Legislature's 1975 plan is entirely improper; in reversing the District Court's judgment this Court held that the District Court "erred in deciding the constitutional challenges to the Acts based upon claims of racial discrimination." *Connor* v. *Waller, supra,* 421 U.S. at 656. Indeed, the Attorney General's Section 5 objection to the Legislature's plan negates the District Court's finding.

Second, even if the District Court's finding of good faith is correct, that finding is not a sufficient reason for denying an award of attorney's fees authorized by the statutes applicable here. In *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968), successful plaintiffs in a public accommodations discrimination case sought an award of attorneys' fees under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a). The Court of Appeals for the Fourth Circuit instructed the District Court to award counsel fees under the Act only to the extent that the defendants' defenses had ben advanced "for purposes of delay and not in good faith" (390 U.S. at 401). This Court reversed, holding that since the Act had been passed by Congress to vindicate a policy that Congress considered of the highest priority, successful plaintiffs under the Act "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust" (*id.* at 402).

Congress in enacting the 1975 attorney's fee amendment to the Voting Rights Act made clear that the *Newman* standard should likewise apply to awards of attorney's fees under the new statute:

> "It is intended that the standards for awarding fees under Sections 402 and 403 be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the Constitutional clause or statute under which fees are authorized by these sections, if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968)." S. Rep. No. 94-295, 94th Cong., 1st Sess. 40-41 (1975) (footnote omitted).

This section was originally introduced in the House of Representatives as Section 402 of H.R. 6219, and the House committee report specifically approved the same standard:

> "The Committee further notes its approval of the prevailing case law which holds that where a statute authorizes it, a successful plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an aware [sic] unjust.' *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400, 402 (1968) (per curiam)." H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 34 (1975).

See also, 121 Cong. Rec. H 4720 (daily ed. June 2, 1975) (remarks of Cong. Edwards); 121 Cong. Rec. H 4734-35 (daily ed. June 2, 1975) (remarks of Cong. Drinan).

Under the principles of *Bradley* v. *School Board of City of Richmond,* 416 U.S. 696, 711 (1974), that "a

court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary," the District Court should have allowed plaintiffs their attorney's fees for all services rendered, including those rendered prior to the effective date of the new law. *Wallace* v. *House,* —— U.S. —— (No. 75-914, decided April 26, 1976), on remand, *Wallace* v. *House,* 538 F.2d 1138, 1146-48 (5th Cir. 1976); *Panior* v. *Iberville Parish School Board,* 543 F.2d 1117 (5th Cir. 1976); *Lytle* v. *Commissioner of Election of Union County,* 541 F.2d 421, 426-27 (4th Cir. 1976); *Ferguson* v. *Winn Parish Police Jury,* 528 F.2d 592, 599 n. 13 (5th Cir. 1976).

Further, in enacting the new law to enforce Fourteenth Amendment guarantees, Congress indicated an express intent that state officials—such as the defendants here—should be held liable for fee awards:

> "As with cases brought under 20 U.S.C. § 1617, the Emergency School Aid Act of 1972, defendants in these cases are frequently state or local bodies or state or local officials. In such cases it is intended that the attorneys' fees, like other items of costs, will be collected either from the official directly, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." S. Rep. No. 94-295, *supra,* at 41-42.

See also, 121 Cong. Rec. H 4720 (daily ed. June 2, 1975) (remarks of Cong. Edwards, a floor leader of the bill in the House).

Subsequent to the filing of plaintiffs' attorney's fees motion, but prior to the November 12, 1976 Opinion of

the District Court, Congress enacted into law the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 (October 19, 1976), which provides an additional and supplemental basis for a fee award in this case since it expressly covers actions like this brought pursuant to 42 U.S.C. § 1983 (Revised Statutes Section 1979). The legislative history of this new act expressly indicates that Congress intended it to apply retroactively to pending cases.[120] As with the new attorney's fee provision of the Voting Rights Act, the legislative history of the Civil Rights Attorneys' Fees Awards Act of 1976 expressly indicates that Congress intended courts to award fees under the new statute regardless of whether the defendants had acted in bad faith and that fees should ordinarily be awarded "unless special circumstances would render such an award unjust,"[121] and to award attorney's fees against state officials.[122] Cf. *Stanton* v. *Bond,* —— U.S. —— (No. 75-1413, decided November 30, 1976).

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, this Court should (1) vacate those portions of the District Court's judgment containing the Senate plan and House districts 32, 33, 34, 35, 47, 53, 54, 55, 56, 88, and 89, and remand to the District

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[120] H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4, n. 6 (1976); 122 Cong. Rec. S17052 (daily ed., Sept. 29, 1976) (remarks of Sen. Abourezk).

[121] H.R. Rep. No. 94-1558, *supra,* at 6, 9; S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976).

[122] H.R. Rep. No. 94-1558, *supra,* at 7; S. Rep. No. 94-1011, *supra,* at 5; 122 Cong. Rec. H12160 (daily ed. Oct. 1, 1976) (remarks of Cong. Drinan).

Court for the adoption of, for the Senate, the Modified Henderson Plan and the Census Tract Plan for Hinds County, and for the House, the alternatives proposed by the plaintiffs and/or plaintiff-intervenor; (2) direct the District Court to order special elections in all majority black legislative districts contained in its permanent plan, as revised and amended on remand, except for House Districts 48, 49, 57, 64, 65, and 67, to be held as soon as practicable; and (3) reverse that portion of the District Court's judgment denying plaintiffs an award of reasonable attorney's fees.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION No. 3830(A)

(CAPTION OMITTED IN PRINTING)

Motion for an Award of Attorney's Fees

(FILED JUNE 15, 1976)

Plaintiffs, by their attorneys, move the Court pursuant to the 1975 amendments to the Voting Rights Act of 1965, Section 402, P.L. 94-73, 89 Stat. 404 (August 6, 1975) for an award of reasonable attorney's fees in favor of counsel for the plaintiffs covering the period March 14, 1973 to present in the amount of $21,350, based on 427 hours of work necessarily performed by lead counsel for the plaintiffs at an hourly rate of $50 per hour for a case of this nature on the grounds:

(a) An award of attorney's fees is authorized by the above-cited statute, *Wallace* v. *House,* 44 U.S.L.W. 3607 (U.S. April 26, 1976) (No. 75-914); *Hall* v. *Issaquena County Bd. of Supervisors,* 526 F.2d 711 (5th Cir. 1976); and

(b) The requested $50 hourly rate has been approved by the U.S. Court of Appeals for the Fifth Circuit, *Davis* v. *Board of School Comm'rs of Mobile County,* 526 F.2d 865 (5th Cir. 1976).

In support of the award, plaintiffs submit herewith the affidavit of lead counsel for the plaintiffs testifying to the number of hours of service actually and necessarily performed on behalf of the plaintiffs, and supporting the

hourly rate requested as prevailing and reasonable in this case.

Respectfully submitted,

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Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

(CAPTION OMITTED IN PRINTING)

Affidavit in Support of Motion for Award of Attorney's Fees

STATE OF MISSISSIPPI)
) ss.
COUNTY OF HINDS)

FRANK R. PARKER, after first being duly sworn, deposes and says:

1. I was admitted as counsel for the plaintiffs *pro hac vice* in this case on April 5, 1973. Order of April 5, 1973. Since that time I have been lead attorney for the plaintiffs in association with Mississippi co-counsel.

2. *Qualifications.* I received my LL.B. degree from Harvard Law School in June, 1966. I have been engaged in legal work and practice of the law since my admission to the Bar of the U.S. District Court for the District of Columbia on January 20, 1967, first with the Office of General Counsel, U.S. Commission on Civil Rights (1966-December, 1968), and then with the Lawyers' Committee for Civil Rights Under Law (Dec., 1968 to present). I am presently Chief Counsel of the Lawyers' Committee. I am admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the Fifth and District of Columbia Circuits, and the U.S. District Court for the Northern District of Mississippi.

While at Harvard Law School, I assisted in establishing and was a founding editor of the Harvard Civil Rights-Civil Liberties Law Review, which is now in its eleventh year of continuous publication.

As a staff attorney with the U.S. Commission on Civil Rights, I assisted in writing the following Commission staff reports:

Southern School Desegregation, 1966-67 (July 1967)

Political Participation (May 1968) (principal writer)

I have written and published the following law review articles:

"Evans v. Newton and the Racially Restricted Charitable Trust," 13 Howard L.J. 223 (1967)

"County Redistricting in Mississippi: Case Studies in Racial Gerrymandering," 44 Miss. L.J. 391 (1973)

2. *Experience and ability.* Since admission to practice law, I have devoted my time almost exclusively to the subject area of constitutional and civil rights, and after leaving the government, to representing clients in civil rights cases involving racial discrimination. Within the area of civil rights cases, I have developed a specialization in voting rights cases. I have surveyed the case law and secondary sources, including books and law articles on voting rights, and have attended and spoken at national conferences and seminars on the subject. I have been lead counsel for the plaintiffs on a substantial number of voting rights cases involving the right to vote and county redistricting including the following reported cases:

Thompson v. *Brown,* 434 F.2d 1092 (5th Cir. 1969)

Evers v. *State Bd. of Election Comm'rs,* 327 F. Supp. 640 (S.D. Miss. 1971) (three-judge court), appeal dism'd, 405 U.S. 1001 (1972)

Hall v. *Issaquena County Bd. of Supervisors,* 453 F.2d 404 (5th Cir. 1971), 526 F.2d 711 (5th Cir. 1976).

Howard v. *Adams County Bd. of Supervisors,* 453 F.2d 455 (5th Cir. 1971), cert. denied, 407 U.S. 925 (1972),

480 F.2d 978 (5th Cir. 1973), cert. denied, 415 U.S. 975 (1974).

Kirksey v. *Board of Supervisors of Hinds County,* 402 F. Supp. 658 (S.D. Miss. 1975), aff'd, 528 F.2d 536 (5th Cir. 1976), pending on rehearing en banc.

3. *Novelty and difficulty of the questions.* This case at various times presented questions of the applicability of the requirements of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, and the applicability of the constitutional and statutory voting rights requirements to both legislatively enacted and court-ordered legislative redistricting plans.

4. *Time and labor required.* The following is an accurate itemization, to the best of my personal knowledge, records maintained in the ordinary course of business, and estimation, of the time I have spent preparing, filing, prosecuting, and trying the pleadings and claims of plaintiffs in this case, exclusive of travel time:

3/14/73	Plaintiffs' objections to H.B. 446 and S.B. 1701	7 hrs.
4/10/73	Deposition of Rep. Stone Barefield (all deposition references include preparation and taking of the deposition)	10 hrs.
4/13/73	Dep. of Sen. James "Con" Maloney	6 hrs.
4/13/73	Dep. of Rep. Horace Lester	4 hrs.
4/17/73	Dep. of Lt. Gov. William Winter	6 hrs.
4/17/73	Motion for substitution of parties	1 hr.
4/17/73	Motion for continuance	0.5 hrs.
4/19/73	Plaintiffs' objections to H.B. 3189 and S. B. 2452	8 hrs.

4/20/73	Dep. of Harold E. Sweeney, Jr.	10 hrs.
	Dep. of Dr. David Valinsky	4 hrs.
4/26/73	Motion for leave to file supplemental complaint	15 hrs.
5/3/75	Hearing on motion for leave to file supplemental complaint	3 hrs.
5/20/74	Motion for review and reconsideration of order denying leave to file supp. complaint.	3 hrs.
10/1/74	Deposition upon written interrogatories of Hon. J. Stanley Pottinger	8 hrs.
10/17/74	Dep. of James W. Loewen	10 hrs.
11/1/74	Dep. of Dr. Gordon G. Henderson	10 hrs.
10/11/74	Plaintiffs' request for admission of facts and genuineness of documents	30 hrs.
11/15/74	Motion to compel answers to request for admissions	1 hr.
	Memorandum in support of motion to compel answers	5 hrs.
	Reply memorandum in support of motion to compel answers	4 hrs.
12/2/74	Hearing on motion to compel answers	2 hrs.
1/30/75	Motion for order to show cause	2 hrs.
2/3/75	Dep. of Rims Barber	12 hrs.
2/7/75	Hearing and preparation for hearing	20 hrs.
2/14/75	Memornadum of law	27 hrs.
3/17/75	Dep. of Henry J. Kirksey	10 hrs.
4/15/75	Amended complaint (per order of Court)	15 hrs.
4/17/75	Motion to alter or amend judgment	5 hrs.

5/7/75	Hearing and preparation for hearing	20 hrs.
	Plaintiffs' supplemental post-trial memorandum	8 hrs.
5/14/75	Motion to supplement the record	1 hr.
5/22/75	Notice of Appeal	0.5 hr.
5/23/75	Motion for stay pending appeal (Dist. Ct.)	1 hr.
5/23/75	Jurisdictional statement (U.S. Sup. Ct.)	30 hrs.
5/23/75	Application for stay pending appeal (U.S. Sup. Ct.)	8 hrs.
5/27/75	Certificate of compliance with Sup. Ct. rule	1 hr.
6/3/75	Supplemental memorandum (per order of U.S. Sup. Ct.)	15 hrs.
6/6/75	Motion for temporary restraining order	2 hrs.
6/9/75	Motion for injunctive relief	3 hrs.
6/12/75	Hearing and preparation for hearing	10 hrs.
6/17/75	Memorandum of law on remand	10 hrs.
6/20/75	Hearing and preparation for hearing	15 hrs.
7/3/75	Plaintiffs' objections to proposed court-ordered districts	6 hrs.
7/8/75	Modified Mitchell Plan No. 2	8 hrs.
7/21/75	Motion to alter or amend judgment	15 hrs.
11/15/75	Plaintiffs' county boundary plan (per court order)	10 hrs.
2/9/76	Plaintiffs' supplemental submission on county boundary plan (precinct plan)	20 hrs.
6/14/76	Amendments to supplemental submission	5 hrs.
TOTAL HOURS		427 hrs.

This itemization does not include time spent preparing the recent petition for writ of mandamus and brief and reply brief in support thereof in the U.S. Supreme Court. I estimate spending 35 hours on this matter.

I certify that the above-stated work was necessary to the prosecution of this action and that the services listed were actually and necessarily performed.

5. *Hourly rate.* The plaintiffs in this case are indigent persons who cannot afford to pay attorneys' fees at the prevailing rate in this case, and therefore the Lawyers' Committee for Civil Rights Under Law has no fee arrangement with the plaintiffs. The Lawyers' Committee for Civil Rights Under Law is a privately funded charitable organization which provides legal representation in non-fee generating civil rights cases, and is dependent upon court awards of attorneys' fees in appropriate cases for part of its income. I have made inquiry of attorneys in the Jackson, Mississippi, area regarding the hourly rate that would normally be charged by private practitioners in a case such as this and have determined that the minimum and reasonable hourly rate would be $50.00 per hour.

/s/ Frank R. Parker
Frank R. Parker

(Subscription Omitted in Printing)

(Certificate of Service Omitted in Printing)

APPENDIX B

Counties Subdivided by Constitutional Provision or Statute for Legislative Representation.

Miss. Const., 1890, Section 254.

> "Twelfth—The county of Lauderdale shall have three Representatives, one to be elected by the city of Meridian, one by the county outside the city limits, and one by the whole county including Meridian.
>
> Thirteenth—The county of Adams outside the city of Natchez shall have one Representative and the city of Natchez one Representative.
>
> Fourteenth—The county of Lowndes shall have three Representatives, two of whom shall be elected by that part of the county east of the Tombigbee river, and one by that portion of the county west of said river.
>
> Fifteenth—The county of Oktibbeha shall have two Representatives, one of whom shall be elected by that portion of the county east of the line running north and south between ranges thirteen and fourteen, and the other by that portion of the county west of said line."

Hemingway's Annotated Code of Mississippi, 1917, Section 5341.

> "1. Hereafter the representation in the lower house of the legislature for Warren county shall be selected as follows:
>
> Two representatives shall be elected from the county at large, and may come from any part of the county, and one representative shall be selected outside of the city of Vicksburg and the municipalities adjacent thereto, and the qualified electors of the city

of Vicksburg and the municipalities adjacent thereto shall not vote for the selection of that representative who is to be chosen outside of the territory above specified. (Laws 1906, ch. 124. In effect January 2, 1906)."

Miss. Laws, 1940, ch. 275.

"Eleventh.—The county of Yazoo shall have three representatives, and the county of Hinds shall have three representatives, and they shall have a floater between them. Provided, however, that two of the representatives of Hinds county shall be elected by the city of Jackson and that one of the representatives of Hinds county shall be elected outside the limits of the city of Jackson. Provided further, however, that the district qualifications of the representatives of Hinds county shall not apply to the floater representative."

Miss. Laws, 1954 Gen. Sess., ch. 317.

"Nineteenth.—The County of Chickasaw shall have two representatives, one of whom shall be a resident of and shall be chosen by the qualified electors of that portion of the County in the first judicial district and the other shall be a resident of and shall be elected by the qualified electors of that portion of the County situated in the second judicial district."

APPENDIX C

Recent Discriminatory State Legislation Showing the Unresponsiveness of the Mississippi Legislature to the Needs and Interests of the Black Community and Denials of Equal Access to the Political Process.

Miss. Laws, 1962, ch. 537, requiring at-large election of members of municipal boards of aldermen.	Held to have been enacted for a racially discriminatory purpose to prevent the election of black aldermen, and enjoined. *Stewart* v. *Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court).
Miss. Laws, 1965 Extra. Sess., ch. 11, requiring literacy as a condition to voter registration.	Enjoined as violative of the Voting Rights Act of 1965, *United States* v. *Mississippi,* 256 F. Supp. 344 (S.D. Miss. 1966) (three-judge court).
Miss. Laws, 1965 Extra. Sess., ch. 19, repealing Miss. Code Ann. § 3273 (1956 Recomp.), providing assistance at the polls to illiterate voters.	Held violative of the Voting Rights Act of 1965, assistance to illiterate voters ordered, *United States* v. *Mississippi,* 256 F. Supp. 344 (S.D. Miss. 1966) (three-judge court).
Miss. Laws, 1965 Extra. Sess., ch. 38 (S.C.R. 102), petitioning Congress for constitutional convention to overrule *Reynolds* v. *Sims.*	

Miss. Laws, 1965 Extra. Sess., ch. 39 (S.C.R. 102), petitioning Congress for constitutional convention to eliminate public school desegregation.	
Miss. Laws, 1966, ch. 290, p. 374, amending Miss. Code Ann. § 2870 (1956 Recomp.) to authorize switch to at-large election of county supervisors.	Held to be a change in election laws which must be submitted under Section 5, *Allen* v. *St. Bd. of Elections,* 393 U.S. 544 (1969), after submitted USDJ objected under Section 5, 5/21/69.
Miss. Laws, 1966, ch. 406, authorizing switch from election to appointment of county superintendent of education, and requiring appointment in 11 specified counties.	Same.
Miss. Laws, 1966, ch. 613, increasing the qualifying requirements for independent candidates for office.	Same.
Mi.ss Laws, 1966 Extra. Sess., ch. 41, (S.B. 1504), reapportioning House and Senate including multi-member districts.	Held unconstitutional for malapportionment, *Connor* v. *Johnson,* 265 F. Supp. 492 (S.D. Miss. 1967).
Miss. Laws, 1967 Extra. Sess., S.R. 101, petitioning governor to include in call of session HEW school desegregation guidelines and to declare them null and void in Mississippi.	

Miss. Laws, 1968, ch. 564, p. 946, amending Miss. Code Ann. § 2870 (1956 Recomp.) to authorize at-large election of county supervisors.	Never submitted under Sec. 5 and therefore unenforceable.
Miss. Laws, 1968, ch. 393, authorizing payment of tuition grants to students attending racially segregated private schools formed as an alternative to public school desegregation.	Enjoined as unconstitutional, *Coffey* v. *State Educ. Finance Comm'n,* 296 F. Supp. 1389 (S.D. Miss. 1969) (three-judge court).
Miss. Laws, 1969 Extra. Sess., ch. 27 (H.B. 67), providing loans for educational expenses of students attending racially segregated private schools formed as an alternative to public school desegregation.	Enjoined as unconstitutional, *Coffey* v. *State Educ. Finance Comm'n,* Civil No. 3906 (S.D. Miss. Sept. 2, 1970) (three-judge court).
Miss. Laws, 1970, ch. 374, making freedom of choice school attendance law and policy of state.	
Miss. Laws, 1970, ch. 390 (H.B. 839), establishing discriminatory education requirements for early childhood education and Head-start teachers.	Voided by Federal regulation, amendment to Head Start Policy Manual, Part B, § 3, subparagraph a(1), June 8, 1970.

Miss. Laws, 1970, chs. 506, 508, the "open primary" laws, abolishing party primaries, requiring a majority vote to win general election, etc.	Enjoined for lack of adequate Section 5 clearance, *Evers* v. *State Bd. of Election Comm'rs,* 327 F. Supp. 640 (S.D. Miss. 1971) (three-judge court), appeal dism'd, 405 U.S. 1001 (1972); Section 5 objection by USDJ, 4/28/74.
Miss. Laws, 1970, ch. 543, exempts private schools from corporate franchise tax.	
Miss. Laws, 1971, ch. 394, reapportioning House and Senate including multi-member districts.	Held unconstitutional for malapportionment, *Connor* v. *Johnson,* 330 F. Supp. 506 (S.D. Miss. 1971) (three-judge court), vacated and remanded on other grounds, 404 U.S. 549 (1972).
Miss. Laws, 1971, ch. 493, amending Miss. Code Ann. § 2870 (1956 Recomp.) to authorize switch to at-large election of county supervisors.	Section 5 objection by USDJ, 9/10/71.
Miss. Laws, 1972, ch. 490, § 502, amending voter registration form to ask additional burdensome and harassing questions (¶ 7), amended in 1975 under Congressional pressure reviewing extension of Voting Rights Act of 1965.	

Miss. Laws, 1973, H.C.R. 55, petitioning Congress to call constitutional convention to prohibit pupil assignment in public schools on account of race.	
Miss Laws, 1974, H.C.R. 42, petitioning Congress to repeal the Voting Rights Act of 1965.	
Miss. Laws, 1975, H.B. 907, §§ 2-39, reenactment of the "open primary" law (1966 Laws, ch. 506, 508) rendered unenforceable by Section 5 objection, 4/28/74.	
Miss. Laws, 1975, S.B. 2218, the "James Meredith" law, requiring independents to qualify at the same time as party candidates, similar to provision of 1966 Laws, ch. 613, rendered unenforceable by Section 5 objection, 5/21/69.	
Miss. Laws, 1975, chs. 484, 510 (H.B. 1290 and S.B. 2976), reapportioning House and Senate and including multi-member districts.	Invalidated by Section 5 objection under Voting Rights Act, 6/10/75.

Miss. Laws, 1976, ch. 485, reenacting the "open primary" law previously rendered unenforceable by Section 5 objection, abolishes party primaries, requires a majority vote to win general election.	Invalidated by Section 5 objection under Voting Rights Act, 8/23/76.